HARVARD HISTORICAL MONOGRAPHS

I. Athenian Tribal Cycles in the Hellenistic Age. By William Scott Ferguson.

II. The Private Record of an Indian Governor-Generalship. The Correspondence of Sir John Shore, Governor-General, with Henry Dundas, President of the Board of Control 1793–1798. Edited with an Introduction and Notes by Holden Furber.

III. The Federal Railway Land Subsidy Policy of Canada. By James B. Hedges.

IV. Russian Diplomacy and the Opening of the Eastern Question in 1838 and 1839. By Philip E. Mosely.

V. The First Social Experiments in America. A Study in the Development of Spanish Indian Policy in the Sixteenth Century. By Lewis Hanke.

VI. British Propaganda at Home and in The United States From 1914 to 1917. By James Duane Squires.

VII. Bernadotte and the Fall of Napoleon. By Franklin D. Scott.

VIII. The Incidence of the Terror During the French Revolution. A Statistical Interpretation. By Donald Greer.

IX. French Revolutionary Legislation on Illegitimacy, 1789-1804. By Crane Brinton.

HARVARD UNIVERSITY PRESS

CAMBRIDGE, MASS., U. S. A.

HARVARD HISTORICAL MONOGRAPHS

IX

PUBLISHED UNDER THE DIRECTION OF THE DEPARTMENT
OF HISTORY FROM THE INCOME OF

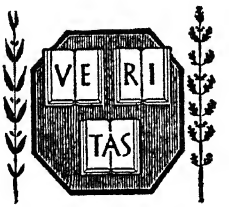
THE ROBERT LOUIS STROOCK FUND

LONDON : HUMPHREY MILFORD
OXFORD UNIVERSITY PRESS

French Revolutionary Legislation on Illegitimacy 1789-1804

BY

CRANE BRINTON



Cambridge
HARVARD UNIVERSITY PRESS
MCMXXXVI

PRINTED IN THE UNITED STATES OF AMERICA

To My Father

CONTENTS

PREFACE

I DO not think anyone has approached this subject with exactly the preoccupations that have led me into it. Broadly, these preoccupations have to deal with the problem of the relations between what men say and what they do; or, in terms perhaps too abstract, that of the relations between ideas and the rest of the content of human lives. My own position on this problem has clearly been much influenced by such writers as Marx, Sorel, and especially Pareto, to which last writer I owe my introduction, as do so many others, to Professor Lawrence J. Henderson. This study is, however, a relatively specialized piece of historical research into a specific problem. It does indeed imply a point of view, but nothing so ambitious as a sociological system.

Nor has this subject, seen merely as a problem in the arrangement of a complicated legislation in an understandable chronological sequence, ever received monographic treatment. It appears as an episode in manuals of history of French law, such as that of Brissaud. Nineteenth century controversy over article 340 of the Napoleonic Code—"la recherche de la paternité"—went over the ground time after time, but almost always as a mere preface to a contemporary polemic. The only considerable historical work to concern itself with revolutionary legislation on illegitimacy is Sagnac's well-known *Législation civile de la Révolution francaise*, where

this phase of family law occupies some twenty-odd pages. Sagnac outlines legislation on illegitimacy with admirable clearness, and establishes the essential chronology in a way that hardly needs supplementing. But like his master Aulard, Sagnac never goes beneath the surface of official declarations, never really sees the problem at all. For him, revolutionary legislation was the attempt to put into practice the sound ideas of the Enlightenment; where such legislation failed, the simplest explanation is to be found in Bonaparte and Reaction. Revolution and Reaction contend simply, like opposing armies. Actually, the decisive strife lay within the consciousness of the individual. The revolutionist was also a reactionary; the enlightened had many a blind spot.

The following study, then, attempts to trace some aspects of the struggle between theory and habit to master *the same individuals*—most of them quite good Jacobins. Its documentary basis owes much to pamphlets in the Boulay de la Meurthe collection now in the library of Harvard University. This collection, especially rich in all matters where organized Christianity touched modern French life, offers much unexplored material to the historian of the Revolution.

I wish to thank for aid with the manuscript or with proofs three of my colleagues at Harvard: Professors Paul Rice Doolin, W. L. Langer, and Arthur Nock.

CRANE BRINTON

Dunster House, Harvard University.
October 1, 1935.

FRENCH REVOLUTIONARY LEGISLATION ON ILLEGITIMACY

I

THE French Revolution affords the historian an excellent opportunity to test the relations between what men do and what men say, or, more broadly, to test the rôle of "ideas" in history. Most educated—and many uneducated—men of the generation which had matured by 1789 had been brought up to contrast existing institutions, existing ways of life, most unfavorably with "rational" institutions, with life according to an immanent but unrealized "Nature." The Enlightenment had spread to quite ordinary men the feeling that life on this earth was at last about to become consistently pleasant for everyone. Burke early commented upon the actual revolutionary movement in France in terms later taken up by Taine, and still repeated (though with different tones of regret or rejoicing) by historians and political theorists. Briefly, this familiar analysis follows: the *philosophes* spun out of their own heads a series of abstract propositions about an unreal, generalized man; the revolutionists, a fanatical minority, cast out of their lives traditions, loyalties, beliefs, habits, all the absurd, essential stock of emotion that ties men to this earth, and actually tried to rule France in accordance with the theoretical propositions of the *philosophes;* violent, determined, and well-organized, they were able to rule briefly through the Terror; ultimately, the commonsense majority won out, and order was restored,

though only at a heavy price in civil and foreign war. The heirs of the Jacobins would put their conclusion a bit differently. According to them, the high ideals of the revolutionists were defeated by the selfishness of the few and the indifference of the many. But the two schools are united in seeing the crisis of the Revolution as a complete break with the past, as a consistent attempt by some individuals to put eighteenth-century political theories into practice.

Debated though it has been by several generations, this old question of the part played by political and social theories in the French Revolution may still provide a not unfruitful subject for investigation. We may, for instance, ask ourselves just how the abstractions of the *philosophes* were translated by the revolutionists into concrete legislation, and then—and this is the important step—ask how this legislation was applied to the specific problems arising under it. How did the lawmakers and administrators interpret the results of their own eloquence? We may no longer with Aulard take the revolutionary word for the deed, nor with Taine see the Jacobin as a man intoxicated with a metaphysical brew. In spite of the guillotine, there is a surprising continuity in the personnel of French government between 1789 and 1799. We must study, not simply a clash between two bands of men, one inspired by one set of ideas, the other by another set, but the clash between competing ideas and emotions *in the same set of men.* We must ask ourselves specific questions, answers to which can be had only by tracing in concrete situations the complex interplay among men of ideas, interests, and sentiments.

Among such questions those presented by the revolutionary legislation on illegitimacy are especially promising. They are concrete, definite questions, limited to one aspect of human relations. They confront perhaps too neatly theory and reality. For the theory of Nature makes no distinction between children born in wedlock and those born out of it. They are clearly procreated in the same way. The reality of marriage makes some children bastards, some legitimate. Moreover, in the family the focus of men's sentiments is reasonably fixed, and it is possible that such sentiments are more stable, perhaps more intense, as it is clear they are more simple, than sentiments focussed on wider groups like State or Church.

We shall then, ask what changes occurred in the legal status of bastards between 1789 and 1804. We shall try to see whether their actual status changed. We shall constantly compare what men said about this portion of family law with what they did about it, and with any indications we can gather as to how they felt about it, especially if their feelings seem not to correspond with their sayings. If it appears that the French family, and men's feelings towards it, actually were modified in this respect during these fifteen years, we shall have a fact of considerable social importance. If the contrary appears, and the family seems in this respect to change hardly at all in these years, we shall also have a fact of some importance. Either result will probably be more useful for an understanding of the social process than any result we could arrive at from the isolated study of what any man—even a Danton or a Robespierre—may have said or written.

II

THE legal position of bastards under the old régime may be conveniently summed up under three heads: their status, their opportunities to prove filiation, their chances of attaining legitimacy. (Bastard is the common eighteenth century term; the Revolution consecrated the euphemisms.[1]) Their status varied somewhat in different regions, especially in the north, where the local *coutumes* still preserved something of feudal diversity. On the whole, however, the work of the king's courts had provided for them as for other subjects a reasonably clear jurisprudence. From a mediaeval status which very frequently assimilated them to serfs, and, if they sprang from adulterous or incestuous unions, almost outlawed them, they had by 1789 attained a position, inferior of course to that of legitimate children, but still very far from that of pariahs. They could own property, they could marry and transmit property to their legitimate children, they could make wills, at least in certain regions. They had a right to demand sustenance until their majority from either or both parents. They were in theory excluded from office, but with the consent of the prince they could become mayors, judges, and even higher officials. Similarly they

[1] The subject is conveniently treated, with abundant bibliographical references, in J. Brissaud, *Manuel d'histoire du droit français* (Paris, 1898), 1120-1124; and in E. Chénon, *Histoire générale du droit français public et privé* (Paris, 1925-29), II, 71-79.

were in theory excluded from holy orders; but the bishop's consent could open minor orders to a bastard, the pope's consent, major orders.[2] Though they could themselves found new families by marriage, they were not in strict theory part of the family of either parent. Hence they had no claim to inherit from either parent. Practice was here milder than theory, a not uncommon situation in the old régime. By the *coutume* of Valenciennes, bastards had a share in a mother's estate; in Dauphiné, bastards born *ex soluto et soluta* (that is, from persons who could legally have married) inherited one-sixth portion of the estate of a father who died without legitimate children, and inherited from a mother on the same bases as legitimate children.[3] Bastards could not in general succeed *ab intestat.* They might receive small sums by will of either parent (*legs particuliers non excessifs*) and similar gifts from outsiders. Very generally even in 1789 the estate of a bastard who died without direct heirs (*hoirs de son corps*) escheated to the *seigneur* as in Brittany, or to the crown. Foundlings were usually cared for in religious institutions, although in Brittany as in England they came as charges upon the parish.

Filiation could be claimed in legal proceedings against either mother or father. The commonest case of course was for the unmarried mother in behalf of herself and her child to bring suit against the putative father. This process, for which the French have the useful phrase *la recherche de la paternité,* was pretty universally permitted during the later years of the old régime, and was to be one of the focal points in the whole revolutionary

[2] E. Chénon, *Histoire générale du droit français,* II, 75.
[3] Fournel, *Traité de la séduction* (Paris, 1781), 248.

debate over illegitimacy. The courts had come to apply very generally a maxim of the early seventeenth century jurist Antoine Favre (Faber), *creditur virgini dicenti se ab aliquo cognitam et ex eo praegnantem esse.*[4] Faber did indeed protect his maxim by the addition *meretrici non item*, but, probably under the relaxing influence of fashionable eighteenth century humanitarian ideas, many courts had drawn the line between *virgo* and *meretrix* at a point rather beyond where Christian habit regards virginity as ceasing. Fournel states that "where there are several individuals against whom there may be just presumptions of paternity, they may be condemned as a group to make provision" for the child.[5] Tribunals actually did this, to the great scandal of the good men who later drew up the Napoleonic Code.

It is important to note, however, several qualifications in this apparently liberal jurisprudence on *la recherche de la paternité*. First, the maxim *creditur virgini* applied only to the immediate emergency of providing for lying-in expenses. Before paternity could be finally fixed, more solid evidence such as writings of the father or known cohabitation had to be brought in.[6] Second, before the final attribution of paternity the man accused of begetting the infant could attempt to prove misconduct of the woman with other men. Third, no action lay where paternity, if proved, would be adulterous or incestuous. Fourth, even where the courts held paternity proved, the man was responsible only for the sustenance of the child to majority, (including the

[4] Quoted in A. Pouzol, *La recherche de la paternité* (Paris, 1902), 14.
[5] Fournel, *Traité de la séduction*, 100.
[6] Brissaud, *Manuel d'histoire du droit*, 1123.

teaching of a trade not "abject") and for damages to the mother. The child had in most parts of France no rights of inheritance whatever against the father, and no right to take his name. When all these considerations are taken together, it does not seem that the jurisprudence of the old regime on this subject was notably lax, notably kindly to bastards and prostitutes. A reading of Fournel's *Traité de la séduction*, published just before the Revolution, suggests that on this question the lawyers were not unaffected by the Enlightenment, that they wished to see the unmarried mother and her child as well provided for physically as possible, that they were reasonably free from Christian distrust of the flesh, but does not in the least suggest that they wished to assimilate the "natural" family to the legal family. Indeed, Fournel is only slightly more touched with humanitarianism than is D'Aguesseau, who wrote before sensibility became fashionable.[7]

Legitimation was possible in two ways. First, it was possible through the will of the King, above the law here as elsewhere. This power was almost wholly limited in practice to the nobility, and to cases where marriage was impossible. Louis XIV's legitimation of his own bastards is a familiar fact of history. Save for very great princes, this sort of legitimation served *ad honorem* but not *ad successionem*.[8] Second, and far commoner, was legitimation by subsequent marriage of parents who had been free to marry at the conception of the child. This had its origin in canon law, and was an obvious

[7] D'Aguesseau, "Dissertation sur les Bastards" *Oeuvres* (Paris, 1772), VII, 381. Dissertation composed early in the century.

[8] Brissaud, *Manuel d'histoire du droit*, 1128.

effort of the mediaeval church to encourage the institution of marriage. Announced in the twelfth-century decretal of Alexander III, *Tanta vis est matrimonii ut qui antea sunt geniti post contractum matrimonium legitimi habeantur*, (a skilfully worded phrase for purposes of propaganda) this principle soon spread over Catholic Christendom, except for England, where it penetrated in 1912.

The legal position of illegitimate children in eighteenth century France was not then exceptionally unfortunate. Their actual position in society depended, in individual cases, on a great many purely personal factors which the historian can never reconstruct. In general, it is fairly safe to assume that actual law deals chiefly with marginal cases, that it provides a minimum of well-being for the illegitimate child. Actions of filiation, suits for support, and similar legal steps needed to be taken only against recalcitrant parents. As compared with legitimate children, illegitimate children no doubt suffered by the existing laws on inheritance. But many parents must have provided for illegitimate children by free gifts and by voluntary legacy. Certainly one need not assume that reality was commonly harsher than the law. Moreover, 18th century society in France was already so complex and so mobile economically and socially as to permit the illegitimate child to hide his origin by the simple expedient of moving to a place where his birth would not be known.

The lack of adequate registration of births and the informality of statistics on population in the old régime make it impossible to give a very satisfactory answer to the important question as to how numerous were

illegitimate births. At Paris in 1775 there were 6,505 foundlings to 19,550 registered births, an extremely high percentage of illegitimacy.[9] Foundlings, however, were brought to Paris from miles around, and this figure is of little or no use in estimating totals for France. Moreover, not all foundlings are illegitimate; some small percentage, at least, are disposed of by wedded parents for economic and other reasons. The ratio of illegitimate to legitimate births was very generally higher in urban centers than in the country, since the foundling hospitals were in cities, and since cities afforded the unmarried mother greater chance for anonymity. Peuchet in 1805 concluded from scattered statistics of the latter half of the 18th century that the urban ratio of illegitimate to legitimate births varied between 1 to 6 and 1 to 9; rural ratios ran from 1 to 70 to 1 to 176.[10] Since France was overwhelmingly rural in population, it is fair to conclude that the number of illegitimate children born in France towards the end of the old régime was not very large and at any rate was not increasing rapidly. In the absence of statistics, it is safer to rest on general opinion, and there seems to have been no great notice taken of any change in the proportion of illegitimate births, no crusade to end a growing nuisance, no conspicuous reform movement directed at this particular issue of illegitimacy.

Now in addition to the legal status and the actual status of illegitimate children in the France of the old régime, there is another phase of their position which

[9] Moheau, *Recherches et considérations sur la population*, 1778, ed. by R. Gonnard (Paris, 1912), 195.

[10] J. Peuchet, *Statistique élémentaire de la France*, (Paris, 1805), 232. These rural ratios are, by any standard of comparison, extremely low.

must be considered before the revolutionary legislation can be approached. How did Frenchmen *feel* about the whole situation involved in the distinction between legitimate and illegitimate children? What sentiments did the word bastardy evoke in them? These are important questions. They cannot here be fully and accurately answered, but enough can very easily be established to serve as the essential background for later consideration.

There can be no doubt of the existence in most Frenchmen of 1789 of a strong sentiment favorable to existing legal distinctions between legitimate and illegitimate children. This sentiment took many forms, and no doubt has many origins. It is perfectly compatible with a certain amount of sympathy with or pity for actual flesh-and-blood illegitimate children. Some such feeling in favour of an established institution is of course indispensable if the institution is to exist, and monogamous marriage had long endured as the law of France. Many institutions, many loyalties, buttressed the monogamous marriage: There was the tradition of the Roman *paterfamilias;* there were the economic habits which made the family a unit of consumption and production, as well as a unit of ownership; there was organized Christianity, which had always preferred marriage to burning; there was the growth, from complex origins, of what came to be called "middle class morality" (a phenomenon as French as it is English, and already evident in the eighteenth century). In such a society, hostility to illegitimate children—or at least hostility towards their emancipation from legal and social disabilities—became a feeling of great strength.

To this day, the French family as a social organization has a discipline, a cohesion, a hold over its individual members, difficult for a modern American to understand.

Whether or not illegitimate children were held in unfavorable regard because their existence shocked the virtuous, or simply because they were outside the family group is for us not an important question. Mrs. Deborah Wilkins, when her master showed her the foundling he had discovered in his bed, broke out, "It goes against me to touch these misbegotten wretches, whom I don't look upon as my fellow-creatures. Faugh! How it stinks! It doth not smell like a Christian."[11] Mrs. Wilkins's emotions were here no doubt stirred from depths not immediately economic or legal in reference. Freud and his compeers have not diminished the importance of what Fielding had observed with his novelist's eye. At the other extreme we may take Montesquieu, who was certainly not shocked by the fact of illegitimacy, but who held that the spirit of the laws obviously could not encourage it. "Il a fallu flétrir le concubinage," he wrote philosophically, "il a donc fallu flétrir les enfants qui en étaient nés."[12] In between these extremes there was room for a great many sentiments to converge on the condemnation of illegitimacy.

What the enlightened called a "prejudice" in favor of the existing distinction between legitimate and illegitimate children clearly existed in the 18th century world. Indeed, a whole bundle of prejudices came to bear on

[11] *Tom Jones*, Book I, Chapter III.
[12] *Esprit des Lois*, Book XXIII, Chapter IV.

the distinction. It is even likely that, as the century progressed, the strength of this bundle was growing as a middle class society gradually encroached on the aristocracy—a process especially notable in France. Aristocratic feelings are commonly less shocked by sexual irregularities than are middle class feelings, and, in particular, a privileged class (or race) never is disturbed by bastards begotten by its male members on women of an inferior class or race. But the French aristocracy was to be overthrown by the middle classes in the great Revolution, never to regain its old dominance, its old ability to set fashions and sentiments. The new ruling class was thoroughly imbued with a feeling for the sanctity of the home, the purpose of the family, the necessity for maintaining a sharp line, especially as regards the laws of inheritance, between legitimate and illegitimate children.

There is, however, another group of uniformities among sentiments about illegitimate children, not perhaps in itself a major element in determining their status, but very probably an important corrective of the previously analyzed group hostile to them. There clings a bit of romance to bastardy. One source of the sentiment is perhaps implied in the euphemism "love child." Children of irregular unions are children of passion; children of continental arranged marriages are not. By a kind of "reasoning" (actually a beautiful example of a non-logical thought-process) to which the still groping science of genetics does not give much support, it is concluded that the child of passion will be a better biological achievement than the child of routine

marriage.[13] Still another source may be the great popular undercurrent of dislike, so strong in the Middle Ages, for the repressive doctrines of Christianity. The bastard had escaped the priest from the start. Again, as bastards were to a degree outlaws, they frequently enjoyed the prestige which the lower classes have always bestowed upon outlaws. Whatever the origin of the sentiment, its existence is plain. Many of the heroes of mediaeval epics and tales were bastards. *Ego, Wilhelmus, cognomine Bastardus*, has an heroic sound, though English school-books apparently prefer William the Conqueror. Some of this feeling still persists, though it has probably weakened steadily ever since the early middle ages. Its importance in 18th century France was that, even in its diminished intensity, it must sometimes have served to soften the harshness with which the illegitimate child might otherwise have been treated. It may, finally, have joined with and helped form the third group of sentiments we shall attempt to isolate.

This third group may be centered about the word "humanitarian." These sentiments supplied whatever power of action the more abstract and impractical theories of the Enlightenment had. Now, though it is clear that in the main where the theories of the Enlightenment did get themselves realized in any permanent way, they

[13] "Why brand they us
With base? with baseness? bastardy? base, base?
Who in the lusty stealth of nature take
More composition and fierce quality
Than doth, within a dull, stale, tired bed,
Go to the creating a whole tribe of fops,
Got 'tween asleep and wake?

King Lear, Act i., Sc. ii.

had behind them *other* sentiments in addition to those commonly called humanitarian, there can be no question that humanitarian sentiments did exercise some power in their own right. That power was, and is, pathetically feeble when contrasted with the claims of humanitarian theories. But it exists, and to deny its existence is almost as great an error as to assume it to be all-powerful. Now many people were moved by the plight of illegitimate children, as they were moved by the plight of beggars, negro slaves, cab horses, prostitutes, and criminals. The literature of sensibility helped to spread these feelings, though one suspects that they were spread rather thinly. The appeal which the revolutionists made in favor of the rights of illegitimate children had, then, some basis in popular sentiment, particularly in the sentiments of the literate and the literary.

On the whole, however, there is relatively little agitation for reform of the status of illegitimate children in the years before 1789. The legists seem to be like lawyers everywhere—interested in the twists and quirks of the subject, not harsh and inhumane, but not quite convinced that human beings will ever behave very differently in the matter of sex relations. Montesquieu calmly accepts existing laws, even in France: "C'est la raison qui dicte que, quand il y a un mariage, les enfants suivent la condition du père, et que, quand il n'y en a point, ils ne peuvent concerner que la mère." Voltaire never crusaded for the rights of illegitimate children. Not, of course, that he shared the prejudice against them. He seems, on the whole, to have been a bit amused by the whole subject—mostly it was taken in

deadly earnest—and to have felt that it exhibited to the full the serio-comic spectacle of man's inability to live up to the best and the worst of his religion. He is obviously pleased that Dunois was a bastard, and added a few picturesque details to the article *bâtard* in the *Grande Encyclopédie.*[14]

In the *cahiers* of 1789, there are few signs that Frenchmen were greatly concerned over the problem of illegitimacy. Two Provençal communities, Allen and Vernègues, did say in identical clauses, "We ask that bastards be given a civil and political status, like that which they enjoy in several neighboring kingdoms; and among others, the recent legislation of His Majesty the Emperor on this matter is a desirable pattern, in view of the fact that the French Nation ought not to yield to any in the humaneness of its laws."[15] The third estate of St. Alban in Brittany remarks, "The unfortunate state of bastards, who are not the cause of their birth, excites our commiseration and we ask that they be eligible to inherit from their mothers (a right which they already possessed in certain regions), without, however, permitting them to claim any rights of collateral inheritance."[16] This is a modest demand. St. Germain-du-Puy, near Bourges, was even less radical. Its citizens wished only to see illegitimate children adequately

[14] *Esprit des Lois*, Book XXIII, Chapter III: *Dictionnaire philosophique*, s.v. Bala, bâtards. The great encyclopedia, incidentally, treats the subject without any crusading fervor whatever.

[15] Quoted in P. Sagnac, *La législation civile de la Révolution française* (Paris, 1898), 317, note. The Emperor Joseph II had allowed certain rights of inheritance to illegitimate children. See Brissaud, *Manuel d'histoire du droit*, 1125, note 2.

[16] H. Sée and A. Lesort, *Cahiers de doléances de la sénéchaussée de Rennes* (Rennes, 1909-12), II, 595.

nourished. "The law which requires the Lord of the manor to provide for the upbringing of bastards is not observed according to His Majesty's intentions. In addition to being deprived of the honor of legitimacy, these unfortunates have also to undergo the hardship of lacking for their very means of existence."[17]

Those *cahiers* which concern themselves at all over the question of illegitimacy are mainly troubled about the fate of foundlings. They do not ask for changes in the legal status of illegitimate children. What disturbs them is a question of public welfare, like mendicity or poor relief, and they content themselves with asking that the machinery of government be modernized to take care of such social problems. Brittany, in which the overwhelming majority of *cahiers* referring to the question of illegitimacy are to be found, is a special case of this issue of poor relief. Breton law threw illegitimate children on the parish, while it permitted escheat of their property, should they lack direct heirs, to the *seigneur*. Parish after parish complains of this injustice, and asks either that the *seigneur* give his rights to escheat over to the parish, or that he assume support of illegitimate children. Here again, there is no demand that illegitimate children be given the legal status of legitimate children.[18]

[17] A. Gandilhon, *Cahiers de doléances du baillage de Bourges* (Bourges, 1910), 403.

[18] To M. Sagnac's list of cahiers dealing with this question may be added, in addition to those quoted above: C. Bloch, *Cahiers de doléances du baillage d'Orléans* (Orleans, 1907), II, 92, 339; L. Cathelineau, *Cahiers de doléances des sénéchaussées de Niort et de St. Maixent* (Niort, 1912), 399; P. Boissonade, *Cahiers de doléances de la sénéchaussée d'Angoulême* (Paris, 1907), 123; F. Lesueur et A. Cauchie, *Cahiers de doléances du baillage de Blois* (Blois, 1908), I, 15; A. Le Moy, *Cahiers de doléances des corporations de la ville*

The question of the legal and social status of illegitimate children was not one that seemed to be of great importance in the France of 1789. There was no organised pressure-group interested in the rights of illegitimate children. What evidence can be drawn from the writings of the *philosophes* and from the *cahiers* shows that the question was considered rather as one of poor-relief, as a matter of alleviating the poverty and neglect suffered by many illegitimate children, rather than as a problem of their complete emancipation. Still, the issue was there, and the humanitarian sentiments which were to pour themselves out over the issue were already provided with their essential rationalization. "Nature" was for the moment too busy with the French constitution and the rights of man to bother with illegitimate children, but their time would come.

The syllogism lay ready: All men are created equal; bastards are men; therefore bastards are the equals of other men. To this argument the "pre-romantics" added touches of colour. One of the most effective was Rousseau's opposition of Nature and Society. Man's moral acts have their source in his natural self; his immoral acts, in his social self.[19] Children are born of love, not of marriage, and Nature knows no illegitimacy,

d'Angers (Angers, 1915-16), I, 39; II, 651, 690, 775; H. Sée et A. Lesort, *Cahiers de doléances de la sénéchaussée de Rennes* (Rennes, 1909-12), 4 vols. *passim*. J. Savina et D. Bernard, *Cahiers de doléances des sénéchaussées de Quimper et de Concarneau* (Rennes, 1927), I, 275; J. Vernier, *Cahiers de doléances du baillage de Troyes* (Troyes, 1911), I, 206, 279; III, 206. This latter humanely asks that the government support foundlings until they reach the age of *ten*, after which they can support themselves by a trade.

[19] Rousseau, except in moments of petulance, said nothing as simple as this. Indeed, he is often aware that man is to the full a moral and political animal, that the "state of nature" is what Sorel later called a "myth". But his ideas descended into the crowd in some such formula as the above.

though clearly she has her doubts about the fruits of loveless marriages. The whole sentimental school helped to spread the fashion of damning the conventions of Augustan society in the conventional terms of natural sensibility. The plays of Diderot, the homiletic paintings of Greuze, the tracts of Rousseau and Bernardin de St. Pierre all served to tie the sentiments of the newly-literate middle classes to the abstraction, Nature.

This complex interweaving of abstraction and sentiment, of attacks on class distinctions, economic or social privilege, education, and the evils of seduction and illegitimacy is seen at its best in a play of the German Kotzebue, *Das Kind der Liebe*, which enjoyed international fame at the end of the eighteenth century. The baron, at bottom sound, but ridden with class prejudices, has a natural son by a peasant woman, and a legitimate daughter by a noblewoman. When the play opens he is a widower, and when it ends, converted by the horror of a close escape from hanging his natural son, whom he had completely neglected, and had not known by sight, he is about to marry the peasant woman he had wronged. A poor clergyman supplies virtue and sentiment. There is a coxcomb nobleman, the Count, who is a suitor for the hand of the legitimate daughter, and who serves as a foil for the repentant baron. The baron has just (with blushes) confessed that he has a natural son and (proudly) that he intends to marry the mother.

"Count: And may one ask the name of his Mother? Is she of family?

Baron: She is—good pastor, tell him what she is!

Pastor: A beggar.

Count: (laughing) *Vous badinez!*[20]

Pastor: Her name, if you wish to know it, is Wilhelmina Boettcher.

Count: *Von* Boettcher? I never heard of the family.

Baron: She belongs to the family of honest people, and that is a damn'd small one.

Count: Quite a *mésalliance* then?

Pastor: Generosity and integrity unite themselves with love and constancy—call that a *mésalliance* if you please.

Count: *Un fils naturel!—à la bonne heure!*—Why I have two. There must be *moments* in a man's life, when if a pretty girl fall in his way—such things happen every day. But *mon dieu!* one never troubles one's head with such beings—unless to put them to some trade perhaps, and so make them useful in the world. Mine are both to be made *friseurs.*"

The Count gives up his suit in disgust, and leaves the stage to the pastor and the now united family. The baron, among other things remarks to the pastor.

"You are a NOBLE MAN—I am only a Nobleman."[21] Yet it is significant that, out of this hodgepodge of sentiments, that of the integrity of the family emerges at least as strong as any other. The illegitimate child is an object of pity; but his unrepentant procreator is an object of hatred. Nature, like God, is fortunately not bound to logical consistency.

[20] The French makes him a coxcomb.

[21] A. von Kotzebue, *The Natural Son,* translated by Anne Plumptre (London, 1798), 75-77.

III

THE status of illegitimate children was not an unavoidable problem in a France faced with the necessity of devising a new constitution. Any lingering feudal disabilities that weighed on illegitimate children were swept away by the National Assembly, but that body never succeeded in legislating on their status in civil law. Peuchet did publish two letters in the *Moniteur* which foreshadow the work of the Convention. If the National Assembly should refuse to make a law on this subject, he wrote, natural justice, religion, and philosophy would get together and make one. "The errors of formal ethics, deliberate celibacy, accidents, personal mistakes, have created in society a persecuted class, hardly known to civil law, and which intolerance designates as 'illegitimate', as if there were some men more 'legitimate' than others!"[1] In a later article, Peuchet

[1] *Moniteur*, réimpression, V, 20 (2 July, 1790) Peuchet, as was the fashion, produced a *projet de loi* in which many of the subsequent difficulties, and especially that of *la recherche de la paternité* are clear.

1. La bâtardise et ses effects sont supprimés, comme contraires aux droits de l'homme, à la justice naturelle, au bonheur des familles, à l'amour filial et aux devoirs de l'autorité domestique.

2. La sainteté du mariage civil sera toujours respecté; mais l'enfant né hors des cérémonies qui le caracterisent n'en aura pas moins tous les droits de famille du côté de sa mère, qui est toujours connue, et même du côté de son père, lorsqu'il voudra se faire connaître positivement.

3. Les distinctions de mère naturelle et de mère légitime sont détruites, comme étant sans aucun effect civil de l'enfant à la mère, et de la mère à l'enfant.

has apparently moved still nearer the radical suppression of all distinctions in practice between legitimate and illegitimate children by admitting *la recherche de la paternité*, although "it is sometimes a bit difficult to assign paternity when good will is not there."[2]

Le Chapelier did manage to insinuate into a project for a law on the *état civil* in 1791 a clause which would make all children legitimate who could show that their parents possessed the *état* of man and wife—that is, that they had lived together. The reception accorded this clause in debate showed that many Frenchmen were still good *pères de famille*, that the laws of Nature had not penetrated completely into their sentiments. Martineau, after pointing out that a couple might come to Paris, live together unmarried, produce a child, and that according to Le Chapelier's system that child could inherit from the father, exclaimed "Do you think, Gentlemen, that the child of this concubinage should have the right to demand his father's property?" Cries of "Yes, Yes" and "No, No," interrupted him. He continued, "There is another question to examine: the child may be able to prove that he is the son of a given woman; but he will not perhaps be able to prove quite so easily that he is the son of a given man (laughter). Gentlemen, this would mean the overthrow of our social foundations!" To which Prieur replied that though this might be true, the abolition of all distinctions between

4. Les conditions du partage des biens entre les enfants nés avant ou après le mariage civil suivront les lois des héritages et du partage entre les enfants nés des divers lits.

5. Les devoirs et les droits de l'autorité domestique sont les mêmes sur les enfants, dans quelque état qu'ils soient nés; la naissance est la seule règle avouée de la loi, la seule qui donne le pouvoir de la paternité.

[2] Moniteur, VII, 200, (24 Jan. 1791).

legitimate and illegitimate children "is but the consequence of principles of equality established for all citizens".[3]

The conservatives prevailed, and Le Chapelier's project was shelved. Some other traces of agitation are to be found, and when Cambacérès brought the matter before the Convention he referred to numerous petitions in the papers of the committee on legislation, many of which were left over from previous assemblies.[4] Peuchet's articles had no doubt attracted some attention. A Madame Grandval had agitated the question before the Legislative Assembly, and in that body Léonard Robin had proposed legislation in favor of illegitimate children.[5] Yet there was no great stir about the matter and the ubiquitous Jacobin clubs were not greatly disturbed over it.

The Convention did, however, finally come to consider legislation affecting the legal status of illegitimate children. On 4 June, 1793, it listened to a convincing dissertation by Cambacérès reporting for its committee on legislation, and, anxious to make a generous gesture, though not quite agreed as to just how generous to be, voted the following decree:

"The National Convention, after having heard the report of its committee on legislation, decrees that children born out of wedlock shall inherit from their father

[3] *Archives parlementaires*, XXIV, 497-98 (1 April 1791). Of all the voluminous literature on illegitimacy produced during the Revolution that little "(laughter)" is the only trace of what were doubtless impure thoughts. The legislators approached the subject with a notable degree of superiority to what they no doubt considered its bawdy aspects. This may explain some of the unreality of their legislation.

[4] *Archives parlementaires*, LXVI, 34 (4 June 1793).

[5] Sagnac, *Législation civile*, 318-19.

and mother in accordance with forms which shall be determined.

"And orders the printing of the report and project for a decree, and adjourns the discussion until it shall have heard from its committee on legislation as to methods of adoption and as to inheritance in general, this committee being charged to present its conclusion on these matters as soon as it may be possible to do so."[6]

The author of this motion, Cambacérès, was a lawyer from Montpellier who had a hand in all revolutionary legislation on illegitimacy, from the ecstatic surrender to Nature of 1793 to the authoritarian and traditionalist Code of 1804. The nineteenth century was astonished by the careers of such men as Talleyrand, Fouché, and Cambacérès, who served Republic and Empire alike. But the nineteenth century set a very high standard of consistency—in words. Actually most Frenchmen managed to change their principles several times between 1789 and 1815, and Cambacérès is a far more typical person than St. Just or Robespierre. He was, in 1793, simply at the height of revolutionary circumstance.

Provisions dealing with illegitimacy were made in the

[6] Adoption, so Roman in its connotations, delighted the *Conventionels*. Berlier and Oudot printed their opinions. The cycle is not unlike the cycle of the rest of revolutionary legislation on the family. There is a brief idealist outburst in 1793-1794, and projects of laws are drawn up giving anyone come to majority the right to adopt. These projects are nourished on love of Nature and on hope of breaking up great fortunes. After Thermidor there is a cooling process, and the Napoleonic Code itself is very strict, permitting adoption only to persons over fifty who have no living direct heirs, and hedging the whole institution about with great care. See *Archives parlementaires*, LXX, 640-642; 702-712 and *Code Napoléon*, articles 343-360. A sentence of Berlier's ought, however, to be brought out again from the obscurity of the records: "*Les droits sacrés de la nature!* Ah, je les respecte; mais ne convient-il pas de les définir?" *Archives parlementaires*, LXX, 703.

project for a Civil Code submitted to the Convention in the summer of 1793 (of which more later) but nothing was formally enacted into law. The decree of 4 June had whetted various appetites, and under some pressure the Convention satisfied these in a law of 12 brumaire, year II (2 Nov. 1793). This law is the most favorable to illegitimate children of all revolutionary legislation. It represents the full working-out of those ideas of natural equality we have previously analyzed. On paper, it does almost realize the boast of its proponents, "il n'y a plus de bâtards en France."

This law provides, first, that living children born out of wedlock shall have rights of inheritance in estates opened since 14 July 1789. This is one of the most curious monuments to revolutionary enthusiasm to be found in legislation. It is, of course, in defiance of all sound principles, an *ex post facto* law, a kind of law abhorred by all good democracies.[7] Why should an illegitimate child whose parent died 13 July 1789 not be permitted to re-open the inheritance, while one whose parent died on 15 July was so permitted? Bastille Day was chosen because it marked the regeneration of France. Regrettably, there *were* bastards before that day, thanks to monarchical and feudal prejudice. After that day, there clearly could have been no bastards, and so ci-devant bastards might begin, if a trifle retroactively in 1793, to enjoy their rights from that day on.

Article 2 is the crucial one: "Their rights of inheritance are the same as those of other children." Articles

[7] Cambacérès defended this retroactivity as follows: "This principle (of no *ex post facto* laws) does not apply when it is a question of a right which we get from Nature." *Archives parlementaires*, LXX, 553.

3-7 regulate the securing of property due the illegitimate children from inheritances already settled between 1789 and 1793, and attempt to achieve this with as little disturbance as possible. Article 8, again, is very important: "In order to be admitted to the enjoyment of the above rights of inheritance from their deceased fathers, children born out of wedlock shall be required to prove their possession of the status of such a child. This proof can be derived only from public or private writings of the father, or as a result of support given under the name of paternity, and without interruption, support extending to education as well as to maintenance. The same provisions obtain as regards inheritance from mothers." This article, in other words, sanctions legal action for filiation against father or mother unwilling to admit that relationship, and does but lay down in the most general terms that such action must have some basis, or in French terms, "un commencement de preuve". Article 9 then excludes illegitimate children from interfering with collateral inheritances opened between 14 July 1789 and 12 brumaire, year II, but provides that *in the future* illegitimate children and their parents' collateral relatives will have reciprocal inheritance rights in case of the failure of direct heirs.

Article 10 then announces that the status and the rights of children born out of wedlock whose parents *shall be living* at the time of the promulgation of the Civil Code is left for the provisions of that Code. As the Code was not to be promulgated for nine years, this provision was to have its inconveniences. Subsequent articles made minor adjustments, gave the illegitimate child whose parents died *before* 14 July 1789 right to

one-third share of that of a legitimate child provided the estate had not yet been settled (a commentary on the possibilities of legal delay!), and extended to illegitimate children who could prove filiation by article 8 "relief voted in favor of children of the defenders of the fatherland." Article 13 very specifically differentiates between illegitimate children born of parents free to marry, and those born of adulterous unions. "Exception is made of those children whose father or mother was, at the time of their birth, engaged in the bonds of marriage. To them there shall merely be granted, as maintenance, one-third in property of the portion to which they would have had a right had they been born in wedlock."[8]

The law of 12 brumaire does not quite eliminate all distinctions between children born in, those born out of, wedlock. A child of an adulterous union is, from the point of view of property and inheritance, equal to only one-third of a child of a free union, though one would suppose Nature to be as unheeding of the petty convention of adultery as of any other convention. As the law stands, children born of incest are not mentioned, and therefore presumably enjoy full rights. Incest, of course, is so shocking to ordinary human beings (unless they are reading poets like Shelley) that it is usually hushed up, and does not appear in probate courts. The law of 12 brumaire contained, indeed, a dangerous ambiguity. For inheritances opened between 14 July 1789 and the passing of the law in November 1793 it was clear; it was clear also as to what would happen once the Civil Code was promulgated. As to the present and the im-

[8] The text of this law is in *Archives parlementaires*, LXXVIII, 182-184.

mediate future, it was not altogether clear. Apparently article 8—which permitted *la recherche de la paternité*—was meant to apply until the Code was finished. But there was room for argument, especially when lawmakers had begun to repent the enthusiasms of the Republic of Virtue.

This law of 12 brumaire is the extreme point of actual legislation on illegitimacy. There is, however, a *projet de loi* brought forward by Durand-Maillane on 9 August 1793 which goes even further towards abolishing all distinctions between legitimate and illegitimate children. In addition to what is granted by the law of 12 brumaire, Durand-Maillane proposes to provide specifically that illegitimate children of minors or other persons under some form of guardianship shall have full rights to obtain maintenance from the ascendants of such minors or dependent persons; that if filiation is contested it may be proved by declaration of the father and the mother, by declaration of the mother, supported by written proof showing frequentation by the father, or by possession of proof of the status of a child, certified by four witnesses who can attest that the child was recognized by the father by acts or deeds, or even by *words*, of paternity; that the child of a father already married shall have the right to one-half the share of his father's property that goes legally to legitimate children, as well as the right of full maintenance from his father; that a child "d'une fille notoirement publique" is a public charge, though the mother, if she wishes to recognize it, may take care of it, with financial aid from the state, until it is three, or longer if she can get the municipal authorities to certify that she has reformed

her life.[9] Here the child of adultery is, from the point of view of inheritance, worth only one-half of the child of marriage or of straightforward fornication. Otherwise this project goes as far as the tenderest humanitarian could ask. It was not enacted into law.

The debates which lead up to this revolutionary legislation, though like most debates of the time they are conducted on a different plane of abstraction from ours, are extremely interesting examples of the conflict of sentiments, and the attempt to solve that conflict by a few simple formulas deduced from the expression of these sentiments. One sentiment pushes straight for the full attainment of equality between legitimate and illegitimate children (the word "bastard," or even the phrase "illegitimate child," is by this time never used; the stock phrase is "child born out of wedlock"). The other insists on the sanctity of marriage and the home, on the monogamous marriage as a moral absolute. None of the orators, even when most clearly impelled by the first sentiment can altogether free himself from the second.

Nature and Reason, those eighteenth century substitutes for the Trinity, gave benediction to Cambacérès's first speech in behalf of illegitimate children. "Citizens, nature and reason unite to ask for a law in favor of natural children." Their word has cancelled the errors of centuries. "There is a law higher than all others, a law eternal, unchangeable, suited to all peoples and to all climates, the law of nature; there is a code of nations which the centuries have not been able to alter, nor commentators to contort; it is then this law that we

[9] *Archives parlementaires*, LXX, 668.

must consult. Our hearts are here the tables of the law; the judgment is written here, and the chisel of nature has engraved here in inviolable characters those precepts equally applicable to natural children and to children born in wedlock". In spite of all this, fallen men have made civil laws on bastardy in conflict with natural law, and persist in making full parenthood depend upon a mere ceremony. "Strange alteration where respect is given the form and outrage done to nature". Before he concludes his exordium, Cambacérès delivers himself of a phrase which, in one form or another, has continued to be one of the stereotypes of the movement to break down social and legal discrimination against illegitimate children: "for nature, which has imposed upon us the law of dying has not made it a crime for us to be born."[10]

Berlier, too, appealed to Nature. "Citizens, I am going to speak of the rights of nature, I am going to ask them in favor of that class of men whom an absurd form of government condemned too long to misfortune and abject misery. The language of erudition will not adorn my speech. I cannot here find examples to guide me; nature, everywhere violated, can let us see only monstrous practices, born of error and perpetuated by cold injustice."[11] Even when, under the Consulate, the defenders of illegitimate children were fighting a losing fight, they still appealed to Nature: "Natural Right!

[10] The speech is in *Archives parlementaires*, LXVI, 34-36 (4 June 1793). The actual *projet de loi* which follows is singularly complicated and obscure, and its text contrasts strangely with this appeal to the clarity of Nature and Reason. The Convention could hardly avoid sending it back to committee, from which it emerged eventually as the law of 12 brumaire.

[11] *Archives parlementaires, LXX*, 654 (9 Aug. 1793).

Unique refuge perhaps from a not unforgivable sin! Unique resource of two human beings abandoned by society! imprescriptible and sacred right, which civil laws may modify, but which they may not destroy save by odious tyranny!"[12]

Another appeal to the sentiments of the legislators lay in their present enlightened superiority to the sentiments they had felt before their emancipation. Cambacérès addressed them as follows: "To lay these questions (about illegitimacy) before philanthropic legislators is to anticipate their decision; it would do them a grave injury to dare suppose that they would shut their ears to the incorruptible voice of nature, to consecrate at once the tyranny of habit and the mistakes of jurists."[13] "Prejudiced men, if such there still are, I beg you to put them (prejudices) away," began Berlier, who like all successful orators knew the value of flattering his audience.[14]

Closely related to these flattering references to the enlightenment of the revolutionaries are innumerable passages in which opposition to this radical assimilation of illegitimate to legitimate children is made a sign of adherence to the old régime. In very dubious appeals to history, bastardy is made a product of feudal France. The original Franks and Gauls, children of nature, did not know this humiliating distinction. The Roman law of property brought it in, and feudal tyranny extended it. Cambacérès was possessed of knowledge sufficiently exact to enable him to fasten the responsibility for the

[12] Speech of Duveyrier, P. A. Fenet, *Recueil complet des travaux préparatoires du Code civil* (Paris, 1827), VIII, 174.

[13] *Archives parlementaires*, LXVI, 34 (4 June 1793).

[14] *Archives parlementaires*, LXX, 654 (9 Aug. 1793).

French law of bastardy on Hugh Capet.[15] By another approach, bastardy was made a clerical invention, a part of the great conspiracy of priests to dull men's minds and live as parasites on their ignorance. Hesitation on the proposed legislation would thus identify a man with the two worst counter-revolutionary groups, the aristocrats and the clergy.

All these words culminate in a most successful onslaught on all possible variants of the word bastard. Oudot proposes to restore to unfortunates born out of wedlock the tenderness and the care of their parents "by destroying all these barbarous distinctions between illegitimate children, simple bastards, and adulterous or incestuous bastards". The law therefore will decree that it "recognizes no bastards", that "all children are legitimate", and, to guide public opinion towards a gentler word, will suggest that those children unfortunate enough not to know who their parents are will be called "orphans" like those who have lost their parents.[16] Thus, by the simple expedient of abolishing a word, the Convention had all the satisfactions of abolishing a condition, and not nearly so many of the inconveniences.[17]

[15] *Archives parlementaires*, LXVI, 36.

[16] Report of Oudot, *Archives parlementaires*, LXX, 635 (9 Aug. 1793). Similarly Berlier on p. 661. There are perhaps still those who will find it surprising to learn that all this is a preamble to a *projet de loi* which forbids all *recherche de la paternité*, and which effectively eliminates distinctions concerning adultery by refusing to allow married fathers to recognize children born out of wedlock, and by assuming the unknown father to have been "free", all claims to have contrary proofs or declarations being inadmissible.

[17] "We have no legitimate and illegitimate children. Here all children are equal, they are all legitimate." S. M. Glikin, *The New Law Concerning Family, Divorce, Marriage and Guardianship* (in Soviet Russia). Quoted in V. F. Calverton and S. D. Schmalhausen, editors, *The New Generation*, (New York, 1930), 205.

Virtue, of course, would clearly be served by the abolition of legal distinctions against children born out of wedlock. The orators are all convinced that their proposed legislation will increase chastity, parental affection, filial loyalty, sobriety, industry, *la vertu*, in fact. Cambacérès was a trifle over-eloquent, but his argument is clearly the old one that the removal of inhibitions means additional self-control: "Sound morals will have an enemy the less, and passion a brake the more, when it is known that no one is permitted any longer to make a sport of the first sentiments of nature; that nature would indeed be cruel, had she given attraction to love, but no rights to its fruit; when, finally, it is known that no longer can a man betray the hopes of a too-confiding woman, and then abandon the results of a relation which would perhaps not have existed, had it not been for the honorable hope of a legitimate union."[18] Berlier is a bit more specific. He is shocked at infanticide: "The most ferocious animal does not kill its young (Berlier's knowledge of natural history seems inadequate) and if human beings have sometimes been guilty of this height of atrocity, the fault is entirely to be laid upon a bad social system." Shame and poverty in the old régime led to the crime of infanticide, and to the abandonment of children. Poverty we are about to eliminate, and shame we have just abolished by our decree removing all traces of bastardy.[19] Some difficulties will still persist for a while, and wicked men and dissolute women, left over from the old régime, and not educated in republican virtue, will still dodge their re-

[18] *Archives parlementaires*, LXVI, 34 (4 June, 1793).
[19] *Archives parlementaires*, LXX, 657 (9 Aug. 1793).

sponsibilities. For this Cambacérès has a remedy. The virtuous many will trap the vicious few by the simple institution of the jury. "The more different, varied, and arbitrary cases are, the more profitable it is to submit them to the examination and judgment of men without passion, whose sole guide is virtue, and who are not influenced by the prejudices of a legal education." The institution of the jury will end the abuses of *la recherche de la paternité* under the old régime.[20] The Arch-Chancellor of the Empire must have occasionally found it very interesting to run over the notes of his earlier speeches.

None of the orators before the Convention, nor the few humanitarians who protested before the assemblies of Directory and Consulate against renewed legislation discriminating against illegitimate children, ever defended what in modern terms is occasionally called "free love." All accept monogamous marriage as the basis of society, even of republican society. They all disavow any desire to undermine marriage and the family. "But we must not allow the union of one man with several women, and that is what it would have amounted to, had we permitted a married man to acknowledge children born to him of another woman than his wife during his marriage."[21] Therefore we refuse to recognize children of such a union, save as children of their mother. Berlier, after deciding that neither *enfant naturel* nor *enfant illégitime* will do, but only *enfant hors mariage*, re-assures his audience: "Citizens, I too respect the salutary institution of marriage, not that I see in it the

[20] *Archives parlementaires*, LXVI, 35 (4 June, 1793).
[21] Speech of Oudot, *Archives parlementaires* LXX, 635 (9 Aug. 1793).

necessary origin of legitimate procreation, but as an act which assigns everyone to his place, and maintains, in a great society, the harmony necessary to its existence."[22]

Thus, under this flow of pleasant words, Nature, virtue, equality, reason, liberty, the Convention found itself decreeing the abolition of bastardy. Cambacérès, Oudot, Berlier and other orators had played more or less skillfully on the sentiments of their colleagues, and especially on the sentiments of emancipation from prejudice, of love for self-conscious and fashionable innovation, of consecration to a cause, of somewhat public and ostentations, but not insincere, identification of the individual with the community. Here, as in more important, or at least more spectacular acts, the revolutionists were carried far beyond the world in which they had grown up, and in which they were to die (if spared by the guillotine), into that fairer world where whatever is right, is. In this matter of legislation on illegitimacy most of the revolutionists clearly made certain reservations, and launched themselves less confidently into a purely heavenly atmosphere than in such matters as that of the Supreme Being, or that of popular education. Nevertheless, the law of 12 brumaire was pretty completely all that the jurisprudence on bastardy under the old régime had not been.

Now it should be clear that the sentiments we have above analysed as an essential element in the success of Cambacérès and his fellows are difficult to maintain at

[22] *Archives parlementaires*, LXX, 655. Berlier makes the interesting observation "ceux qui connaissent l'influence des *mots* dans une matière, surtout ou l'on est environné des vestiges du préjugé, ne trouveront pas cette discussion inutile." *Archives parlementaires*, LXX, 654. Most of his colleagues were not even troubled by this difficulty of words.

an even strength in large bodies of men. Of other and steadier sentiments the legislation on illegitimacy could rely only on those we have labelled humanitarian; and of those many might be diverted into concern chiefly for the physical welfare of foundlings, for institutional treatment of unmarried mothers, for the social service aspect of the matter. For most Frenchmen, attachment to the *legal* family conflicted with a desire to emancipate the *natural* family, and the "respectable" sentiments were in the long run far stronger than the "advanced" ones. On the whole, the only sentiments which would steadily support the movement for complete abolition of all distinctions between illegitimate and legitimate children were to be found among a relatively small group of men and women for whom it is very difficult to find a name not already surcharged with a dyslogistic value-judgment.

Call them the lunatic fringe—the professional rebels —the permanently maladjusted—the soft-boiled—the defenders of the under-dog—humanitarians; none of the phrases quite fits them, nor is quite fair to them. They do not, indeed, form a homogeneous group either in respect to their political programs or in respect to their sentiments. Yet, if they cannot be neatly sorted into genera and species, the members of the family can be recognized. Shelley clearly belonged. His name suggests an important fact about the relative distribution of these sentiments. Many men, and perhaps even more women, have been moved by Shelley, have felt that he was quite right, have perhaps joined a society for the prevention of cruelty to animals, or children, and another for uplifting fallen women, have eaten a few vege-

tarian meals, and have continued to clip coupons and abstain from adultery. That is, these extreme humanitarian sentiments are frequently fairly widely spread through a society, but they do not lead to the extremists' action. The subject of the sociology of the "humanitarian" sentiments (on the whole this is probably the least objectionable handy term for them) is interesting, and has not, save incidentally by Pareto, been adequately studied, because almost all sociologists are also humanitarians. Here it will be sufficient for us to note that though revolutions occasionally throw up into leadership individuals motivated by extreme humanitarian sentiments, and though, through such individuals, the humanitarian sentiments come to have unique and rather paradoxical importance in violent revolutions (in emergencies, the humanitarian will kill the less well-disposed), in normal times these sentiments are not decisive elements in determining the major acts of a society. Most of us are not upset by inhumanities not directly evident to our senses. Those who are so upset, the humanitarians whose sentiments drive them to consistent and impolite, not to say illegal, actions, are very few, and in pedestrian times and civilisations, not pleasantly conspicuous. Setting aside the question of poetic genius, the admirers of Shelley are more numerous than the Shelleys.

This brings us, however, to a crucial point. In Shelley's lifetime, he was an object of horror and contempt to most Englishmen—a rebel, an adulterer, a vegetarian, a republican, an atheist, a poet, an experimenter in "unmentionable" crimes. Even after his

death, many refused to surrender to his poetry, or distinguished between the poet and the man. Matthew Arnold's dislike for Shelley was the typical Victorian's dislike for the humanitarian "crank." For it would seem that those in whom the humanitarian sentiments take the extreme form of making them follow their theories into action are usually objects of abhorrence to the socially conforming majority in a society. Usually the manifestation of these extreme humanitarian sentiments leads to a display of fear and dislike on the part of this majority. Now as regards our special subject, the monogamous family, the manifestation of extreme humanitarian sentiments takes the form of a demand for free love, for the abolition of marriage, for the elimination from family relations of all compulsion, for divorce at the will of either party, for trial marriages, for communal rearing of children, for abolition of all distinction between legitimate and illegitimate children. That the advocates of these changes almost always maintain that, once realized, such changes will promote what the conformist regards as virtue—that for instance "free" love will actually lead to more stable unions—is not here important. The ordinary man, at any rate the ordinary modern European and American bourgeois, is profoundly shocked and grieved by such proposals. He normally manifests strong feelings of aversion from proposals and proposers alike, and he normally expects government or society to keep such nasty people pretty well under control.

Now most men who made the French Revolution—most, indeed, of the membership of the famous Conven-

tion—were just such ordinary modern European bourgeois.[23] Yet they went a long way along the road towards the legal recognition of free love; they marched in step with men for whom they should have felt the strongest repulsion. These *pères de famille* approved a measure which seemed to destroy the family. In the papers of Cambacérès's committee there is a letter with an endorsement, thus reported by Sagnac: "Letter from the mayor of Montbard, addressed to Cambacérès, 7 June, 1793. At the end of his letter the mayor announces that at the age of 65, he has just had a natural child, and has acknowledged it; he congratulates citizen Cambacérès on his report on natural children, and hopes that his natural son (adulterine) will have an equal portion of his property with those of the four children of his so-called 'legitimate' marriage."

Cambacérès wrote at the end of this letter:

"Citizen, the commendation of men of virtue is the sweetest reward of those who devote themselves to the service of their country. I attach an infinite price to the applause that you give to my report on natural children and to the decree which follows it. The principle (of equal treatment) is adopted, and that is already a great gain. The exact working out of the project will soon engage the attention of the committee and the Convention. *I congratulate the young citizen who owes his being to you on not being the victim of our old errors and of our atrocious prejudices.*" (There is not the slightest indication that Cambacérès ever thought of giving *adulterine bastards* equal treatment.)[24] The full details of this

[23] C. Brinton, *The Jacobins* (New York, 1930), chap. III.
[24] Sagnac, *Législation civile*, 429-430.

episode in the life of the Mayor of Montbard will probably never be known. Some of those actually given in the correspondence will bring a smile to men less inspired by revolutionary optimism than was the mayor. But the whole episode, seen outside its revolutionary setting, must seem a bit unsavory to sober, solid citizens like Cambacérès, future Arch-chancellor of the Empire. This "so-called legitimate marriage," this gloating over sexagenarian virility, this desire to cheat four older children of a share of their due—all this was not quite what the Revolution had set out to achieve? Perhaps you cannot eat your cake and have it? Perhaps there is a connection between the solidity of monogamous marriage as an institution and the maintenance of legal distinctions between children born in, and those born out of, marriage?

At any rate, the men who had just declared the abolition of any such distinctions began fairly soon to restore them. *Their sentiments had never really quite caught up with their theories.* They could not permanently stomach the professional radicals into whose company they had fallen. Once they were convinced that the family—the specifically French family of 1789, with its *puissance paternelle*, its rigid rules of inheritance, its indulgence for masculine wild oats and its severity for even the most interesting female frailty—once convinced that all this was menaced, they took steps to protect it.

IV

THEY took steps to protect it even before the radical law of 12 brumaire was passed. In the project for a civil code advanced by Cambacérès in the summer of 1793 is to be found the formula by which the law of Nature was reconciled with the necessities of an old, honored, respectable and indeed indispensable institution,—the French bourgeois family. Illegitimate children—the poor little "orphans" of the text of the law—are to be given full rights, *if* their father will acknowledge them; but *la recherche de la paternité* is forbidden, and no married man is permitted to acknowledge illegitimate children.[1] This arrangement was defended by Berlier in a long attack against the abuses of the old jurisprudence on *la recherche de la paternité*, and is summed up neatly in a passage which shows how the new privileges given illegitimate children made a plausible reason for the new restrictions imposed upon them: "It is not today a question of a small sum of money to get rid of an onerous claim; it is a question whether, against his conscience and his conviction, you will compel a citizen to receive in his family a child called to enjoy all the rights that position can give."[2]

[1] See Title IV, articles 9 and 12 of the projected Code in *Archives parlementaires*, LXX, 558 (9 Aug. 1793).

[2] *Archives parlementaires, LXX*, 658. Berlier specifically rejects another kind of compromise of more actual benefit to illegitimate children, but less

The arguments by which this new formula forbidding *la recherche de la paternité* was defended are as ingenious, and frequently as deviously related with the sentiments and intentions of the orator, as were the arguments by which the law of 12 brumaire was defended. To these arguments we shall later return. Here we must trace the somewhat confused course of actual legislation. This projected Civil Code was discussed, approved in principle, ordered printed, and circulated, but it was never promulgated as law. The courts had only the law of 12 brumaire to steer by, and that law clearly gave illegitimate children *both* concessions necessary to make their legal status identical with that of legitimate children: full property and inheritance rights and full right to prove filiation against father and mother. Even at the height of the experiment with the Republic of Virtue, there were many who wished to take back this second concession as a make-weight to the first. After the fall of Robespierre, the Thermidoreans turned to this question. But actual legislation was difficult, tied up as it was with the projected Civil Code, and the Thermidoreans attained their ends in a much simpler way. They discovered that the law of 12 brumaire had intended to forbid *la recherche de la paternité*, and, as

conforming to revolutionary logic: "Let it not be said that the child who has been given a father by a jury should be allowed to receive a smaller portion of his patrimony than legitimate children with whom he may be in competition. I cannot divide paternity, nor its results; all or nothing is my maxim in matters of statesmanship; just as there are no half truths, so there are no half-fathers; it is from this sort of compromise with principles—or rather, with prejudices, that only too often there emerge imperfect systems of government." These are such typical revolutionary arguments one almost believes Berlier to be acting upon them; but they would be fatal to his own compromise.

good citizens, decided that the courts ought certainly to carry out a law in the spirit in which it was meant.

First, however, the iniquitous retroactivity of the law of 12 brumaire had to be removed. The expiring Convention abolished this retroactivity on 3 vendémiaire, year III (25 Sept. 1795), but revoked this decree of abolition on the 26 vendémiaire following.[3] The legislative houses of the Directory were less hesitant and more reactionary. By decree of 15 thermidor, year IV (2 Aug. 1796) they abolished the retroactive provisions of the older law and calmly set up another kind of retroactivity. Briefly, those illegitimate children who had secured full portions from estates of their parents who had died between 14 July, 1789 and 4 June, 1793 (the date of Cambacérès' first resolution in favor of illegitimate children) were deprived of these portions and given as annuities the revenue from one-third of a portion.[4]

The more serious problem, however, concerned illegitimate children whose parents had died since 4 June, 1793. As early as 19 brumaire, year III (9 November, 1794) Cambacérès had provided the essential point in exegesis: the law of 12 brumaire had permitted filiation proof—documents, frequentation, etc.—for children whose parents had died *before it was passed*, between 14 July, 1789 and 12 brumaire year II (2 November, 1793), because that was the only proof they could secure. But for illegitimate children whose parents died after 12 brumaire, it clearly intended voluntary recognition by the father as the only possible way of estab-

[3] Duvergier, *Collection complète des lois, etc.*, VIII, 404.
[4] Duvergier, IX, 153.

lishing a status.[5] After the neat trick of retroactive legislation in the year IV, as outlined above, apparently the only illegitimate children who did get full inheritance rights were those whose fathers died between 4 June 1793 and 2 November 1793—about five months!

On 15 prairial, year III (3 June 1795) the Commission of civil administrations and tribunals circularized all French courts as follows: "Legal actions Concerning paternity are forbidden; to convince yourselves of this fact, it will be sufficient to go over with us some of the provisions of the law of 12 brumaire." The circular then says, as Cambacérès had already said, that the generous article 8 of that law (permitting filiation suits and indeed describing the kind of evidence that could be used) "applies only to the past."[6] Similar provisions were contained in a report of the minister of justice Merlin to the Directors on 12 ventôse, year V (1 March, 1797),[7] and in two reports made to the Council of Five-hundred in 1797 and 1798.[8]

Siméon, who gave the first report to the Five-hundred,

[5] "Everyone knows how easily, in the daily run of life, there can be spread abroad the presumption of a paternity that never existed; it is for that reason that the law of 12 brumaire requires the voluntary recognition of the father. You also foresaw the case where the father would no longer be alive, and you said, in article 8, that in such a case the lack of such recognition could be made up for by proof of public or private acts of the father, or of support provided as by a father (soins donnés à titre de paternité)." Cambacérès, quoted in Siméon, *Rapport sur la successibilité des enfans naturels, 18 messidor, an V*. Conseil des Cinq-Cents. (Paris, 1797), 13. This and other pamphlets of the Directory here quoted are in the Boulay de la Meurthe collection in the library of Harvard University.

[6] Siméon, *Rapport*, 13.

[7] Lenoir-Laroche, *Rapport sur une résolution du 16 floréal, relative aux preuves de possession que doivent rapporter les enfans nés hors du mariage depuis la loi du 12 brumaire*. Conseil des Anciens. (Paris, 1798), 15.

[8] Lenoir-Laroche, *Rapport*, 15.

linked these various administrative and semi-administrative orders to the intended legislation of the summer of 1793 which prohibited *la recherche de la paternité*. "If these projects were not formally voted" he said in summary, "neither were they rejected. They at least informed citizens and law courts of the spirit of the law; they were spread abroad by official publicity and by printing." And of various explanations made in administrative orders, "if these explanations have not quite the authority of law, they are commentaries on law, and most worthy of confidence."[9] Truly an attitude towards the law worthy of the most Anglo-Saxon of haters of written codes!

Only one serious effort was made by remaining Jacobins to restore the law of 12 brumaire to its original (and intended?) scope. After the *coup d'état* of Fructidor had frightened many good republicans with the scarecrow of a Bourbon restoration, there is a slight swing to the Left in the Councils, and the debates begin to give forth faint echoes of 1794. In a report to the Ancients of 21 Messidor, year VI, Lenoir-Laroche gave a very able summary of the measures outlined above, and showed how by them the law of 12 brumaire had been "interpreted" into an insistence on voluntary and formal written recognition by the father. He then confronted this judge-and-bureaucrat-made law with the actual text of the law of 12 brumaire, and insisted that, until another formal law was passed, illegitimate children should continue to receive the benefits that that law had provided for them. He quoted a circular of the minister of justice, Merlin, to the effect that illegitimate

[9] Siméon, *Rapport*, 13-15.

children *not* voluntarily recognized by their fathers are in a position of great suspense until the Code is passed, but that there is nothing to be done about it, for "there is less cruelty in this opinion than there would be danger in the opposite one."[10] We are a long way from the immutable decrees of Nature! Lenoir-Laroche, however, attempted to carry the house against this shocking perversion of justice: "These are powerful considerations, and it is not before you, whose very presence here is a hommage rendered to the dignity of marriage (it will be remembered that to be eligible to the Ancients one had to be married or a widower) that they can possibly lose force." Now, the speaker continued, the legislature ought perhaps to pass a new law retracting some of the Convention's liberality towards illegitimate children. But until that is done, the law is the law, and in republics laws must be obeyed as written.[11]

Though a similar resolution, reported by Desmolins, was passed in the Five-hundred, the resolution of Lenoir-Laroche was finally defeated in the Ancients on 12 and 13 thermidor, year VI (30 and 31, July 1798).[12] This was the last serious effort to maintain the full revolutionary position. Though Lenoir-Laroche had in an offhand way referred to twenty-thousand cases decided in favor of illegitimate children according to the full provisions of the law of 12 brumaire—including proofs of filiation—he makes no effort to show the sources of his information.[13] Maleville, indeed, spoke later before the Conseil d'État of these provisions

[10] Lenoir-Laroche, *Rapport*, 18.
[11] Lenoir-Laroche, *Rapport*, 18-21.
[12] Duvergier, X, 320-321.
[13] Lenoir-Laroche, *Rapport*, 22.

against filiation suits as "positive laws," and remarked that "the courts no longer have to deal with suits for damages by reason of paternity" although, he adds, "there is no sign that girls are getting any more chaste."[14] From reports of Siméon and Favard, it is also evident that the courts, though often in considerable difficulties with obscurities in the legislation, were not at all inclined to permit illegitimate children to share inheritances on an equal basis with legitimate children, and were very generally requiring written recognition by the father in cases where the estate had been opened *since* 12 brumaire, year II.[15] To any one familiar with the political methods of the Directory, it will be fairly clear that, out of the confusion and conflicts of old revolutionary administrators a *modus vivendi* was arrived at in which the intentions of the administrators were certainly not sacrificed to the letter of the law. Moreover, the preliminaries to the redaction of that portion of the Napoleonic Code which concerns illegitimacy show clearly that the courts had for a long time been anticipating the famous article 340: *La recherche de la paternité est interdite.*[16]

One brief flare-up of the old humanitarian spirit, now definitely rallied to the defense of *la recherche de la paternité* as an essential element in any attempt to better the condition of illegitimate children, comes in the debates of the Tribunate in 1801-1802. These debates, indeed, were largely responsible for Bonaparte's dislike for that extraordinary body (it could debate, but

[14] Fenet, *Recueil complete*, X, 76.

[15] Siméon, *Rapport*, 2-3; Favard, *Rapport sur un message du Directoire éxécutif, relatif à la reconnaissance des enfans naturels*, 2.

[16] Fenet, *Receuil complet*, X, 47 ff.

could not vote, laws). The occasion was not the proposal of article 340. By the time that article had been prepared, Bonaparte had purified, and indeed emasculated, the Tribunate. It was a seemingly innocent project for the *état civil* (registration of births, deaths, marriages) article 60 of which read, "if declaration is made that the child was born out of wedlock, and if the mother names the father, the name of the father will be inserted in the birth certificate only with the formal addition that he was so designated by the mother."[17] This shocked the conservatives, who wished the law to *forbid* the mother to mention the father's name. One extreme led to another in the debate, which frankly took the turn of considering the social value of *la recherche de la paternité*. Here Perreau, Royoux, Duveyrier and others made a final defense of humanitarian ideals, and said again, though less confidently and with less extremism, what had been said ten years before as to the intentions of Nature, Reason, Virtue, and the Supreme Being. The conservatives won, and article 60 was simply stricken out. The subject is not mentioned in the clauses on the *état civil* in the completed Code, but silence was interpreted rightly enough as unfavorable to the unmarried mother.

The provisions of the Code actually dealing directly with illegitimate children (Livre I, Titre VII, Chap. III, "Des Enfants naturels," arts. 331-342) were promulgated in April, 1803, more than a year after the debate on the *état civil*, and though a few faint humanitarian echoes are heard even in the *Conseil d'État*, there was little obstacle put to their passage. These articles were

[17] Fenet, *Recueil complet*, VIII, 109.

supplemented by articles 756-766 on the relation of illegitimate children to the law of inheritance. The Napoleonic Code forbids legitimation or recognition of children "born of an adulterous or incestuous intercourse" (arts. 331, 335); states specifically that "the natural child, even though acknowledged by the father, cannot have the rights of a legitimate child" (art. 338); forbids *la recherche de la paternité*, save that in cases of abduction where conception coincides with the date of the abduction, the abductor "may be" declared father of the child" (art. 340);[18] admits *la recherche de la maternité*, save where success would involve admission of adultery or incest (arts. 341, 342); declares that "natural children cannot be heirs" (art. 756); grants them, however, *provided they have been legally recognised*, certain concessions—one-third of a full portion (that is, what each legitimate child would get) in competition with legitimate children, one-half such a portion in competition with ascendants or brothers and sisters of parents, three-quarters of such a portion in competition with all other legal heirs, and full inheritance rights if there are no such heirs (as by art. 755 the Code had not stopped including collaterals until it reached the *twelfth* degree, one supposes that the latter case was rare!) (arts. 757, 758); moreover, the Code withdraws from these portions of inheritance, under certain conditions, what parents have already spent on the bringing-up of illegitimate children (art. 761); children born of adulterous or incestuous unions are specifically forbidden to

[18] The original draft had had "sera"; the consul Cambacérès himself, the same flesh-and-blood Cambacérès of 1793 (but older) suggested the change to "pourra." See Pouzol, *Recherche de la paternité*, 43, 44. Even this *recherche de la paternité* is not allowed if the putative father is married (art. 342).

inherit and must be content with support and a training in a trade, dependent on the needs of legitimate children of their parents (arts. 762, 763).[19]

These provisions should certainly have been a bulwark of defense for the legal family, if indeed that family needed defense. It may well be argued that, in its actual working-out, the Code is rather harsher towards illegitimate children than was the jurisprudence of the old régime. Strict interpretation of the interdict against filiation proceedings left the unmarried mother and her child (save in cases of abduction) with no claim even for expenses of lying-in—threw them, in fact, on the mother's family, on friends, or on the state. The slight gains illegitimate children made in the law of inheritance were wholly conditioned upon voluntary paternal recognition. Children of adultery or of incest, specifically damned by the Code, were worse off than under the silence of the old jurisprudence. Of the two concessions of the law of 12 brumaire—full inheritance rights and full right to institute filiation proceeding against father and mother—the first was whittled down until it amounted to very little, and the second was altogether retracted. Yet this part of the Code was virtually drawn up by the *practice* of the Directory, by the very men—Cambacérès, Oudot, Berlier—who had legislated so favorably for illegitimate children in 1793.

Naturally this change of front required rationalizing. The arguments brought up on the side of the purity of marriage are quite as typical and quite as interesting as

[19] Editions of the Civil Code are numerous. In all of them the numbering of the articles is identical. To the curious is recommended: *Code Napoléon, mis en vers français,* par D * * * ex-Législateur (Paris, 1811).

those brought up in earlier years on the side of equality between all children, legitimate and illegitimate. They sound even more familiar than did the earlier arguments.

Many of the arguments used in 1797 and 1798 *against* equality for illegitimate children employ the same ideology, and even the same phraseology, as the arguments used in 1793 *for* equality. They are, in fact, the same arguments; but the abstractions to which they appeal have been made to change front on the question. Notably Nature, which had once made all children equal at birth, now made them all fatherless by cloaking paternity in mystery. In marriage, the law may assume that *pater is est quem nuptiae demonstrant;* outside of marriage, Nature makes any assumptions unjust and inaccurate. "I say that in a matter where everything constitutes a problem, we, feeble human beings, ought to stop there where Nature herself has placed limits."[20] Under the Directory, an orator put it more brutally: "Paternity is Nature's secret, and Nature is silent; it is also the mother's secret, and the mother's evidence is interested, lacks the innocence of candor."[21] Perhaps the most ingenious of these reversed abstractions came from a representative of the Belgian department of the Dyle. Not only Nature, but Equality is against equal treatment for illegitimate and legitimate children. To give to bastards what the law of 12 brumaire gave them "is not simply to give them the rights of a citizen; it is to give them a veritable *privilege;* it is to proceed contrary to the rights of equality."[22] This same orator,

[20] Speech of Berlier, *Archives parlementaires LXX*, 659, (9 Aug., 1793).

[21] Bergier, *Opinion sur la question . . . des enfans naturels.* Conseil des Cinq-Cents (Paris, 1798), 6.

[22] D'Outrepont, *Motion d'ordre sur le droit de successibilité accordé aux enfans nés hors du mariage.* Conseil des Cinq-Cents. (Paris, 1798), 4.

D'Outrepont, succeeded also in showing that natural law excluded illegitimate children from inheritances: "But since natural law does not recognize rules of inheritance, and since the right to inherit is wholly a social and civil institution, it is perfectly clear that, *in accordance with natural law*, the child born out of wedlock has not the slightest right to inherit property from his father."[23]

Civil law had now become a great favorite with the orators. It was very convenient, if your predecessors or you yourself had done something you now wished undone, to point out that where natural law stopped civil law began, or that what natural law found obnoxious, civil law found essential. Siméon put it clearly: "The law of inheritance appertains to the realm of civil law. . . . Doubtless it is to be desired that it be applied as nearly as possible in accordance with the sentiments of nature, combined with the principles of political economy (a new note!), of morals, and of the preservation of societies; but after all, the law of inheritance is a part of civil law; it is not part of natural law, and if it were, the cause of children born out of wedlock would be no less unfortunate."[24] Later Siméon added that civil law was a higher achievement than natural law, certainly in this matter: "It is the increasing perfection of social ideas that make it possible to distinguish among the children of the same father those which he has had from this or that woman."[25] This is to reverse the favorite Rousseauistic argument of the humanitarians, that in the

[23] D'Outrepont, *Motion d'ordre*, 9.
[24] Siméon, *Rapport*, 7.
[25] Siméon, *Rapport*, 19.

virtuous childhood of the race bastardy was unknown—a reversal that was to be used constantly throughout the nineteenth century. In spite of the support it got from Darwinism, this argument when it appears in politics is almost always, as it is here, a rationalization, a very definite value judgment.

We do not, then, give up natural law and natural rights; we merely understand them better. "Without doubt, nature has her rights; they are sacred, inalienable, imprescriptible; but these rights have a limit, and that limit is placed at the point where begin the conventions of a well regulated society."[26] Or again: "All philosophical reasoning in favor of illegitimate children —or rather, all the clamor of debauchery—break in vain against reflections dictated by sound morality. It is well and fitting that men be equals as respects their rights; this is a truth which none of us doubts, but it is an error to say that all men are born equals with respect to *political* rights, because it is impossible for an illegitimate child to be born with the rights of a child born of marriage."[27] Lefebvre-Cayet makes the same distinction between nature and society in the familiar authoritarian contrast of private and public: "The private citizen, the man whose limited view sees but one object at a time, may allow himself to be carried away with the idea that humanity would be injured, if illegitimate children did not get each and all the advantages accorded to the legitimate fruits of a legal union. But the views of the legislator should extend over the whole

[26] Pérès, *Opinion sur la resolution du 16 floréal concernant les enfans nés hors du mariage.* Conseil des Anciens (Paris, 1798), 2.

[27] Pollart, *Motion d'ordre sur les enfans nés hors du mariage.* Conseil des Cinq-Cents (Paris, 1798), 3.

nation, and on to future generations. The legislator cannot fail to admit this great truth that, among all peoples, the progress of corruption has marked the progress of their decay, that it would be an even greater act of inhumanity to sacrifice the fate of the nation and of posterity to the interest of a few individuals, and not to embrace firmly any support against the corruption of morals and the evils to which such corruption gives rise."[28]

These arguments lead insensibly to an argument of great persuasive power at a time like that of the Directory and the Consulate, when the moderates have returned to power after the radicals have been beaten in a crisis. The moderates then make much of the Golden Mean. The old régime erred in one way; the Terror erred just as much in the opposite way. Now we restore the balance. The Thermidoreans applied this *politique de bascule* everywhere. Siméon said of illegitimate children at the beginning of his report that, "too much mistreated during the old régime, they were too greatly favored in the new."[29] Regnier expressed the same idea in a hopeful apostrophe: "A time will come, and that time is not far, I hope, when the legislator will be able to attain a happy mean (*juste milieu*), and conciliate by equitable adjustments what the interest of beings innocent of the vice of their birth may deserve and what the honor of marriage and the public welfare may demand."[30] A variant on this argument identifies the

[28] Lefebvre-Cayet, *Opinion sur la résolution du 16 floréal.* Conseil des Anciens (Paris, 1798), 3-4.

[29] Siméon, *Rapport,* 3.

[30] Regnier, *Rapport sur la résolution du 8 frimaire, relative à la successibilité des enfans naturels.* Conseil des Anciens, (Paris, 1798), 3. Note the contrast between "deserve" and "demand."

previous régime with disorder, and insists that the present government is faced above all with the problem of bringing order out of chaos. The chaos is probably very rarely as bad as oratory makes it out to be, and, at the time of the Consulate, it most certainly was not. Bonaparte himself is constantly dwelling on this theme in the proceedings before the *Conseil d'Etat.* Boulay de la Meurthe presents it very well: "The law of 12 brumaire, by assimilating illegitimate children to legitimate children had abolished marriage; it is, therefore, necessary, if we are to re-establish order, to trace between the two kinds of descendants a perfect line of separation, to avoid assimilating one to the other in any respect whatever."[31]

The way is now open to the discovery that all was not error that was said and done before 1789. The past is once more restored to honor, though we are still to be critical in what we take from the past. We are still carrying through a revolution, and the repudiation of our immediate past must not be too complete. Siméon found that the old régime had not been so misguided in its treatment of illegitimate children. "Nature, which assimilates us so definitely to other animals, puts no difference in the birth of individuals; but sociability, but morality, which lift us so high above the level of mere brutes, do not permit us not to consider what circumstances have presided at birth. . . . I have perhaps

[31] Fenet, *Recueil complet,* X, 132. The law of 12 brumaire had not, of course, abolished marriage as a fact and a habit. Boulay, like many other politicians of the time, found it convenient to assume that the revolutionaries had intended the full logical consequences of their words—a useful attitude for a politician in Boulay's position, but not a very profitable one for the modern historian.

been wrong to insist so long on a rule which did not owe its establishment to the *vices of the old régime*, but which is consecrated by the unanimous consent of all peoples, which has its foundations in the very nature of man, in the sentiments which lead him to marriage, in the sense of decency which show him marriage as the only way to reproduce himself without a blush and without shame."[32]

The old régime was right, then, in distinguishing between legitimate and illegitimate children. But it was wrong in permitting *la recherche de la paternité*, in employing that shocking maxim *creditur virgini*. The orators of 1798 actually find that the old régime was sentimental, insufficiently aware of the sacredness of marriage. (You can, of course, find almost anything you like in the past, which is probably what Bolingbroke meant when he said history is "philosophy teaching by example.") Even in 1793, Berlier had attacked the maxim *creditur virgini*, had painted the scandalous licentiousness of the old society: "And what idea can we form of an administration which gave encouragement to libertinage by the legal scope afforded it, which permitted more than one shameless harlot to speculate on her fecundity?"[33] Bigot-Préameneu in the proceedings which led up to the final Code of 1804 grew eloquent in a very philistine way: "For a long time in the old régime a general cry had arisen against *la recherche de la paternité*. These law-suits exposed the courts to the most scandalous debates, to the most arbitrary judgments, to the most variable jurisprudence. The man of purest

[32] Siméon, *Rapport*, 21-22.
[33] *Archives parlementaires*, LXX, 661

life, even he whose hair had whitened in the exercise of all the virtues, was not protected from attack by a shameless female, or by children entire strangers to him. This sort of calumny always left affecting traces. In a word, *la recherche de la paternité* was regarded as a curse of society."[34] Even Duveyrier, who was rather on the humanitarian side than not, could say that in the old days "By the side of one innocent unfortunate girl, a thousand prostitutes speculated" and that "the law sought a father for a child whom twenty fathers might have claimed."[35] These figures are rhetorical rather than statistical; but there is no ground for believing that they correspond even remotely to fact. We have seen above that there seem to be no grounds for believing the actual jurisprudence of 18th century France was notably lax in respect to *la recherche de la paternité.*[36]

As the gates are opened to arguments even when they are based on the experience of the past, others less obviously based on revolutionary phraseology, more definitely tied to the constant sentiments of the speaker, come flooding in. Direct prejudice appears, even towards the innocent children of revolutionary rhetoric. Siméon refers to "obscure, unknown creatures who came to share (under revolutionary legislation) with children born beneath the happy auspices of marriage."[37] Illegitimate children become "sad fruits of a moment of weakness," "fruits of crime and debauch-

[34] Fenet, *Recueil complet*, X, 154.

[35] Fenet, *Recueil complet*, X, 238.

[36] Fenet, *Recueil complet*, X, 239; and also Pouzol, *La recherche de la paternité* 18-22

[37] Siméon, *Rapport*, 7.

ery."[38] Children of adultery or incest are, according to Lahary, "marked with the ineffaceable seal of shame and reprobation." He is especially indignant at the possibility of permitting such a child to sue a parent for support: "Can there be anything more immoral and more contrary to social conventions than to give the protection of the law to the monstrous child who, for the sake of sustenance which he could get elsewhere, would accuse the authors of his existence of having given him birth by a crime?"[39]

What may be described as a good old-fashioned feeling about woman and her proper place in society comes frequently to the surface of the debate. Parent-Réal assured his fellow tribunes that he had even more respect for what is truly feminine than had his sentimental opponents. "Woman," he exclaimed, "she whom by an expression at once sublime and true, man has called his better half." But this better-half will always be protected by French marriage laws of the old strict type. Monogamy is designed to help tender woman even more than her ruder consort. Woman gives up her birthright when she enters into the arena to fight for it.[40] Other orators went further: "In vain do they bring forward the weakness of women; in the arts of pleasing and blinding, they are the strong, they are the powerful sex, and even if we wished to believe officially in their simplicity, in their sweet confidence, in their involuntary weakness, this would be still another reason for surrounding them with one more means of protection."[41]

[38] Fenet, *Recueil complet*, X, 93.
[39] Fenet, *Recueil complet*, X, 199-200.
[40] Fenet, *Recueil complet*, VIII, 223-224.
[41] Siméon, *Rapport*, 33.

This "protection" is, of course, a law forbidding an unmarried woman to institute filiation proceedings against the father of her child. How definitely all this post-revolutionary legislation was based on what the humanitarian would call "masculine prejudices" (we may content ourselves with referring to it as a strong body of sentiments associated with the typically French development of the Roman *paterfamilias*) comes out in another passage from Siméon. He admits that it is rather hard on women to admit *la recherche de la maternité* after forbidding *la recherche de la paternité*.[42] This is especially true since, as he admits, men are not in the least socially disgraced by parenthood outside marriage, and women are socially outlawed by such parenthood. Yet we cannot allow children to be parentless—the state must avoid all suspicion of collectivism—and Nature, our old friend Nature, has made maternity recognizable, and thus cleared the path for the lawmaker.[43]

The integrity of marriage was of course the great argument advanced in favor of the new laws prohibiting *la recherche de la paternité*. "Marriage," said Maleville, "is an association contrived to double the pleasures and to soften the pains of a whole lifetime."[44] At all costs this cornerstone of society must be protected—protected as much against inconvenient truths as against falsity and greed. The defenders of the hearth were at least as rhetorical as the defenders of the dispossessed

[42] Maleville in the *Conseil d'Etat* was for excluding from the Code even *la recherche de la maternité* as leading to perturbations of public order, as stirring up what had better be concealed. Fenet, *Recueil complet*, X, 93. The Napoleonic Code did forbid filiation proceedings against *married* women (art. 342).

[43] Siméon, *Rapport*, 28-29.

[44] Fenet, *Recueil complet*, X, 56.

children of irregular unions. "Marriage protects morals; it is therefore essential that slander should not pursue the husband into the arms of his wife, that it should not strike in advance the young man in the heart of his betrothed."[45] Again and again the law of 12 brumaire is referred to as destroying marriage: "Who does not see that the law of 12 brumaire has made of marriage a feeble, superfluous afterthought in our legislation?"[46] Most of the speakers frankly assume the inevitability of a certain amount of masculine wild oats, and are not unduly disturbed by the plight of the women with whom the oats are sown. The attitude is typically that of respectable nineteenth-century bourgeois, an attitude that could infuriate the romantic souls in opposition. It is clearly an attitude not to be reconciled with any abstract concept of justice. It is an attitude that has to a certain extent been modified in a century and a half of attacks against it. But the brief enthusiasm of the French Revolution merely seems to have given this attitude—sometimes known as the double-standard—a firmer hold in French society.

The final touch in dressing up this renewed, strengthened legislation against equal rights for illegitimate children was the claim that it not only protected the established marriage, but positively encouraged marriage, and discouraged fornication (which is exactly what legislation giving illegitimate children equal rights was about to do in 1793). Lahary was most enthusiastic over article 340 of the Code. "How powerfully would such a law have influenced our morals for the better a

[45] Fenet, *Recueil complet*, VIII, 225—Speech of Parent-Réal.
[46] D'Outrepont, *Motion d'ordre*, 6.

half-century ago! But, delayed though it has been, it will none the less achieve the happy results one ought to expect, since the effect of good laws is to bring with them good morals."[47] Now that they know they cannot foist their children on some rich and respected gentleman by the vicious procedure of *la recherche de la paternité*, women will be more careful of their virtue. Presumably now that they have to answer to their conscience instead of merely to the law for their bastards, men will also think twice before they procreate them. At any rate, morality, which a few years ago was all with Nature in favor of equal treatment of all children, has now decided with equal vigor against such equality of treatment.

What had really happened was seen with extraordinary clarity by Riou, a republican of the old stamp, who began as follows a speech in favor of maintaining the law of 12 brumaire: "Brought up in the corruption of an old monarchy and under the influence of priests, we still yield occasionally, *without knowing it*, to the ascendency of certain prejudices, and we are better Catholics than we think we are. This truth comes out when it is a question of executing laws contrary to the provisions which our civil law had borrowed from canon law, or when it is a question of putting into force *republican* institutions which are contrary, therefore, to our previous habits. Some of our new laws are the work of philosopher-statesmen; but their execution is too often confided to formally-minded lawyers or to routine administrators. . . . When to a great revolutionary soaring there has succeeded a spirit of reaction, this

[47] Fenet, *Recueil complet*, X, 198.

reaction influences not only the opinions, uses, acts, and language of citizens; it directs the acts of public authority, and penetrates even into the sanctuary of legislation."[48] Riou was not, as may be judged from his vocabulary, as penetrating when he turned to the propagation of his own favorite abstractions. But he saw very well what was going on about him, that the old France was asserting itself in the practice of the courts as regards the law of 12 brumaire. The revolutionaries managed to maintain some opposition right down to the actual making of the Code, and for the sake of completeness, it will be well to look at some of their arguments. The whole question still faces modern societies, and the character of our sentiments and our arguments is much what it was in 1800, though conceivably the social distribution of these sentiments has altered somewhat since then.

Duchesne, who reported to the Tribunate the project for the law on vital statistics which contained the disputed article 60[49] made a temperate speech in defense of *la recherche de la paternité*, a speech in which a mild commonsense mingles with Rousseauistic afterthoughts. "I do not suggest" he said, "that we ought to re-establish the maxim *creditur virgini*, invented as it was by just men in favor of betrayed innocence; this maxim would not suit our depraved habits, even in the heart of the countryside. But where would be the harm of admitting the declaration of a female minor, of good life and reputation, when this declaration would simply

[48] Riou, *Opinion sur le vrai sens de la loi du 12 brumaire.* Conseil des Cinq-cents (Paris, 1798), 1-2. The italics are mine.

[49] See above p. 48

oblige the father to provide for the child—and to pay reasonable damages to the girl he has injured?"[50] Perreau actually took up opposing orators who insisted that only one wronged innocent would avail herself of the law to twenty prostitutes. "Do you not really think, if you would be honest, that for one false declaration (of paternity) there would be one hundred true ones?" He continued in a feminist vein rarely heard in France: "Let us be more just towards women, and let us not always make use against them of the fear of vices whose first cause can so frequently be imputed to us men—Let us not run the risk of the reproach that laws made *by* men seem to have been made but *for* them."[51]

Royoux in a moment of bitterness made a remark in which any modern anti-intellectual ought to delight. After many speeches in defense of the integrity of marriage, in which appropriate commiseration was shown for the unfortunate children of unblessed unions, but only very harsh measures proposed for them, Royoux began "Do you really see in these illegitimate children only children of debauch, or, indeed, *are your generous sentiments only oratorical devices?*"[52] Duveyrier also approximated a very modern attitude, though his language and indeed the whole working of his mind was thoroughly in the character of eighteenth-century. All this argument about the positive effects of prohibiting filiation proceedings against the father he said was nonsense; "will women be more virtuous for it, or more

[50] Fenet, *Recueil complet*, VIII, 113.
[51] Fenet, *Recueil complet*, VIII, 149-150.
[52] Fenet, *Recueil complet*, VIII, 155.

prudent, or stronger? No, because nature is changeless in this respect."[53] Beyts, defending the literal interpretation of the law of 12 brumaire before the Five-hundred, appealed to humanitarian impulses, and directed attention once more to the children themselves, "these innocent beings, unhappy victims of a momentary lapse or of the misconduct of the authors of their existence, are they not to be pitied? Oppressed by the barbarism of our old legislation, condemned by public opinion, did they not suffer long enough?" You will be doing them a shocking injustice, he continued, if you take away from them what they have come to expect as their due by the law of 12 brumaire.[54] Riou and Lenoir-Laroche made similar appeals for the application of the law, but, though temporarily successful with the Five-hundred, the movement failed in the Ancients, and the provisions of the as yet unpromulgated code continued, as regards the law of illegitimacy, to be enforced in the courts.

Both Duveyrier and Andrieux showed themselves feminists of the Enlightenment. "Women," exclaimed the former, "always queens or slaves; rulers or victims, what will be your fate? Only yesterday, even in our political decisions, we asked for you political and civil rights; and now today we are debating whether or not we shall take from you the first and most inviolable of the rights of nature."[55] Andrieux, in a speech frankly

[53] Fenet, *Recueil complet*, VIII, 177. We should not now dare say nature was changeless, but we should agree that the way people behave in relation to sex matters changes less rapidly than what they say about sex matters.

[54] Beyts, *Opinion sur le projet de Favard.* Conseil des Cinq-Cents (Paris, 1798), 8-9.

[55] Fenet, *Recueil complet*, VIII, 170.

attacking the proposed article 340, went so far as to hint that men are responsible for fallen women. "She would not have lost her morals (*moeurs* is an exceedingly hard word to translate) if her first seducer had been withheld by a salutary fear of legal responsibility."[56]

Finally, there was the obvious retort that the moderates were not really maintaining their *juste milieu*: "It would be falling into as dangerous an extreme (as that of the Terror) if, to avoid one sort of excess, we should exceed it in the other direction, and sacrifice in the very bases of our civil legislation, because of the plausible scruples of certain individuals, social utility, universal morality, the first precepts of eternal justice, and the most sacred rights of nature." Duveyrier had clearly been unable to adjust his abstractions to the fashions of the hour. The maxim forbidding *la recherche de la paternité* was to him as bad as the maxim *creditur virgini*. "I consider it, like all other maxims born in these times of exaggeration, when in order to avoid one excess, we never fail to throw ourselves whole-heartedly into the contrary one."[57]

At the time, these were voices crying in a wilderness. The majority of the *Conseil d'Etat*, probably a majority of the other houses, were willing to push pretty far away from the law of 12 brumaire. At most the First Consul's dogmatic pronouncement "society has no interest in the recognition of bastards"[58] can have served but to

[56] Fenet, *Recueil complet*, VIII, 198.
[57] Fenet, *Recueil complet*, VIII, 170-176.
[58] Fenet, *Recueil complet*, X, 77.

shorten the debate. The Code, as promulgated, is perhaps the severest piece of legislation on illegitimacy in modern Europe and America. The sentiments in part responsible for the revolutionary legislation were, however, to enjoy a longer and more persistent life than it would seem, to a temperamental conservative, such socially destructive sentiments could possibly have. The nineteenth and twentieth centuries in France have witnessed the gradual breaking down of the Code provisions on illegitimacy under the steady attack of all sorts of groups, mostly of obvious humanitarian inspiration. Literature early took up the cause of the child born out of wedlock.[59] The lawyers took up the matter, and the pros and cons of *la recherche de la paternité* were debated at length in theses and brochures. The growth of the republican tradition identified this portion of the Code with Napoleonic tyranny, and though the Third Republic did not dare give women the vote, it did pass a series of laws which restored illegitimate children practically to the status they had briefly enjoyed in the hopeful year 1793. In 1896 illegitimate children were granted what amounts to equal inheritance rights; and in 1912 article 340 was modified out of existence. For the Spartan vigor of old article 340, "La recherche de la paternité est intérdite" we now read "La paternité hors mariage peut être judiciairement déclarée;" followed by a whole page of specific provisions as to evidence and methods permitted.[60] The *pères de famille* are once

[59] See C. S. Parker, *The Defense of the Child by French Novelists* (Menasha, Wis., 1925.)

[60] See any edition of the *Code civil* after 16 Nov. 1912, art 340.

more on the defensive, and, as one of them writes, "peu nombreux sont aujourd'hui les avantages que présente le mariage sur l'union libre."[61]

[61] J. Thabaut, *L'évolution de la législation sur la famille*, 1804-1913 (Paris and Toulouse, 1913), 139.

V

FROM this survey of revolutionary legislation on illegitimacy certain conclusions may be drawn. In all strictness, we cannot decisively conclude save for the narrow field of human experience directly covered by the facts of illegitimacy, in France, in the years from 1789 to 1804. Beyond this, we may be understood to suggest and to speculate rather than to conclude.

I. In respect to the legislation on illegitimacy, the famous Code completed in the last years of the Consulate clearly is nothing more than an authoritative summary of what had been worked out by various committees on legislation of the Convention, the Ancients, and the Five-hundred, by the co-operation of law courts all over France and her newly acquired territories, and by the efforts of jurists and bureaucrats in various stations in the government. The provisions on illegitimacy in the Code are a digest of revolutionary experience, pretty much in their final form by the year 1800. This is merely a small item to be added to the growing evidence that the *coup d'etat* of Eighteenth Brumaire did not, as Bonapartists, and even good republicans, have maintained, come to bring order miraculously out of chaos. The Directory was a going, if not very heroic, concern, and the work it achieved was the very founda-

tion of the boasted Napoleonic internal stability.[1] Bonaparte may have added a touch of gruffness to article 340, but it is difficult, from a study of the documents assembled by Fenet, to conclude that he or his advisers added anything new to the portions of the Code which deal with illegitimacy. The language of the Code has a precision and a clarity not always found in the revolutionary legislation. But the apparent confusion of that legislation before the Code was drawn up ought not to blind us to the fact that the courts had worked out, especially after the fall of Robespierre had cleared the air, a jurisprudence "sound" and "practical" enough for the most conservative defender of the monogamous family and the double standard of sex morality. Siméon's *projet de loi* of 1797, after a curious first section reviewing revolutionary legislation to get the matter straight, goes ahead to outline measures which are in essentials those of the Napoleonic Code of 1804.[2]

II. The realistic mind will already have asked the question, what effect had all this debating and law-making on the definite phenomenon of illegitimacy? Did the number of illegitimate children—or better, the proportion of illegitimate to legitimate births—increase, diminish, or remain stationary during the revolutionary agitations? Unfortunately, nothing like a satisfactory statistical answer can be given to these questions. We have already seen that the inadequacy of vital statistics under the old régime persists until at least 1800.[3] Good

[1] See R. Guyot in G. Lefebvre, R. Guyot and P. Sagnac, *La Révolution française* (Paris, 1930) 285ff. for a classic statement of the newer attitude towards the Directory.

[2] See below, appendix B. where this *projet* is reprinted entire.

[3] See above, p. 11

tories like Maleville of course believed that the shocking looseness of revolutionary legislation had had an immediate result in increasing the illegitimate birth-rate. "How many children are there who would have been the fruits of a legitimate union," he told the *Conseil d'Etat*, "had it not been for that legislative indulgence for concubinage (the law of 12 brumaire), children who will remain the shameful fruit of debauchery!"[4] And among folk-beliefs concerning revolutionaries in the modern world the belief that they are sexually promiscuous ranks with the belief that they dislike baths, that they are physical weaklings, that they are maladjusted to the society into which they were born, that they are failures, that they are cowards and bullies. (These beliefs are not yet encouraged in Russia, but they soon will be).

Now, as far as the French Revolution goes, there is every evidence that, up to the fall of Robespierre in 1794 the combination of genuine popular belief in the rebirth of the nation and increasing governmental pressure against the more social vices—gambling, drinking, whoring, and the like—resulted in actually diminishing a trifle at least the public practice of such vices.[5] After Thermidor there followed one of the periods known historically as morally corrupt, but here again the evidence suggests that only a small minority of profiteers could in those first years of the Directory afford sin on anything like a grand scale. The amount of fornication and adultery in any given society is probably pretty constant over periods as short as that with which we are

[4] Fenet, *Recueil complet*, X, 56.
[5] C. Brinton, *The Jacobins*, 175-183.

here concerned. Seasonal and other variations there undoubtedly are, and over long periods, and especially when given social and economic classes can be isolated for study, definite changes are probably discernible. But correlation between revolutionary agitation and private vices has never yet been convincingly made.

Moreover, on the narrow problem with which we are here concerned, one consideration alone is decisive. The suggestion is that the law of 12 brumaire, by making illegitimate children equal to legitimate children, made concubinage as easy as marriage, and therefore promoted an increase in concubinage and a decrease in marriage. But as we have seen above, the law of 12 brumaire was virtually nullified by the courts, the minister of justice, and Cambacérès's committee as early as the autumn of 1795.[6] After the *ex post facto* law of 15 Thermidor, year IV had cancelled out—and added to in the opposite direction—the *ex post facto* part of the law of 12 brumaire, only illegitimate children whose fathers died between June and November 1793 really benefited by complete equality. Now, however ill one may think of the common man, however certain one may be that the slightest relaxation of the law will send him flying to abandoned orgies of sexual indulgence, one must admit that, especially in the days before mass suggestion had attained modern standards, it was difficult to make him immediately aware of his opportunities. In a few short months the average Frenchman simply could not be expected to catch up with the law of 12 brumaire. Even granting him unusual alertness—the French have a reputation in these things—the

[6] See above, p. 42

length of the period of human gestation and the fact that, contrary to the ideas of Victorian novelists, conception is not quite a one-hundred per cent chance, made it impossible for any volcanic addition to the illegitimate birth-rate to emerge from the law of 12 brumaire.

The question may, however, be put the other way. Since after all provisions prohibiting *la recherche de la paternité* and otherwise limiting the rights of illegitimate children were more characteristic of prevailing legal practice between 1789 and 1804 than was the law of 12 brumaire, and since these provisions continued into the century of statistics, the nineteenth, might it not be possible to correlate *this* legislation with the ratio of illegitimate births to legitimate ones? The statistics are indeed here:

Number of illegitimate births per 100 legitimate births.[7]

1801-1805	4.8
1806-1810	5.4
1821-1825	7.2
1881-1885	7.8
1886-1888	8.2

"So there," the triumphant humanitarian may exclaim, "are the results of repressive legislation. You charter your libertines by protecting them from filiation suits, and your illegitimate birth rate doubles its ratio to the legitimate in twenty years." Unfortunately for the sake of such neat solutions, other interpretations can be put on these statistics. The most plausible is the one Levasseur himself adopts. Prior to 1816 the new

[7] E. Levasseur, *La population française*, (Paris, 1891), II, 31.

obligatory registration of vital statistics operated poorly, and the low ratio of illegitimate births in the first two decades of the century probably reflects the inefficiency with which such births were registered. For sixty years thereafter this ratio is very stable, varying only between 7.2 and 8.2.[8] So if lax laws did not encourage fornication, it can by no means be proved that strict laws did so either, though this particular law was strict only towards women, and very lenient towards men, and might seem *a priori* to encourage a man to take full advantage of his opportunities.

The fact is that the proportion of illegitimate to legitimate births in a given society must vary in accordance with a very great number of mutually dependent variables—and possibly also in accordance with certain independent variables. The actual state of the law of illegitimacy is not a very large factor. The problem of illegitimacy in our own society can rarely be given a genuinely scientific solution for lack of adequate and accurate information. Now historians, in this respect rather to their disadvantage as compared with their fellow social scientists, have as an inherited disposition the tendency to see cause and effect as a simple unilinear mechanical process. Frenchmen made a certain law on illegitimacy and put it on the statute books; this law therefore "caused" something to illegitimacy—increased or diminished it (the historian could usually prove either increase or diminution as he wished). Actually it is likely that other variables—the spread of a knowledge of contraceptives, the increased mobility of population, and the increase in urban centers, for example—have

[8] E. Levasseur, *La population française*, II, 33.

had a greater effect on the actual number of illegitimate births in France than had changes in legislation.

III. Upon the lives of some of the illegitimate children who did get born the law cannot have been without effect. Here we must repeat that, especially in a modern society, the law directly touches only marginal cases. It was still, in nineteenth century France, the gentlemanly thing to provide for one's own bastards. The increasing anonymity of life in great cities made it easier for the illegitimate child to live down his origin. Though France was definitely behind more evangelical countries like England, Germany and America in social service work, for the very lowest levels of the population of France, orphan asylums, hospitals, and other institutions improved gradually during the century, and, if only because of improvements in medical science, succeeded in saving more lives. Yet the law remained as a definite limit for some, as a general standard not without influence on all. On the whole, it seems evident that the Napoleonic Code, insofar as it affected the lives of illegitimate children, was harsher towards them than had been the law of the old régime. What these children gained in the Code by partial rights of inheritance—and remember that by articles 760 and 761 the cost of their upbringing could be subtracted from their portion due them by inheritance—was more than balanced by what they lost by article 340, forbidding *la recherche de la paternité*. For it was precisely in circumstances where honor, conscience, habit, love, fear or other motives failed to move a father to acknowledge an illegitimate child that an appeal to law was necessary, and it was precisely this sort of appeal upon which article 340 shut

the door. Where the father was willing to acknowledge the child, he was almost always willing to do something for it in a financial way, so that here the inheritance and support clauses of the Napoleonic Code were superfluous; where he was not willing so to acknowledge the child, these clauses did not apply. Moreover, the phraseology of the Code, especially as regards children of adulterous or incestuous unions, is such as to make a rigid distinction between legitimate and illegitimate children, and definitely to relegate these latter to an inferior position in society. They are not to be considered heirs, not to be assimilated to the status of legitimate children, save of course by the subsequent marriage of their parents. The grand upthrust of idealism which in 1794 could declare that "il n'y a plus de bâtards en France" had ten years later given way to a legal system in which bastards were definitely in a worse position than the one they had occupied before the Revolution. One is tempted to moralize, or at least to mention the Eighteenth Amendment.

IV. The Napoleonic Code was certainly not the result of a conspiracy. In view of the persistence of its main provisions on illegitimacy, the first appearance of some of these provisions in the full bloom of the Terror, and their survival, if in an attenuated form, even in the France of today, one must hold that these provisions correspond, as the radical law of 12 brumaire did not, to certain fairly uniform and lasting sentiments among Frenchmen. These sentiments conflicted quite violently with certain other sentiments roused to unusual strength in the early days of the revolution, and were temporarily worsted by them. The problem presented by this

brief victory of apparently less permanent and less firmly rooted sentiments we shall consider presently. Here we are concerned with the more permanent sentiments which found expression in the Code.

Of these sentiments certainly one of the strongest may be described as a sentiment of the integrity of the family. In these days when the word "economic" is supposed to achieve miracles of diagnosis—if not of therapy or prognosis—it would seem obligatory to remark that the integrity of the family has an economic basis. Actually the bundle of sentiments which animated the *père de famille* cannot be neatly analyzed down into economic interests. The Christian monogamous family has had a long development, in which economic interests, religious ideas, law, and ethics, have interacted with the more simple "drives" of human beings to produce a way of life. To explain that way of life as simply a way of making a living is to misunderstand what really happens in society. About the standard of the integrity of the family the nineteenth century French bourgeois—and his imitator, the workingman—could and did group many loyalties and habits. The family should be financially sound; therefore its possessions should not be subject to the claims of illegitimate children not really members of it. The family is a going concern; therefore marriages should be arranged for the maximum financial good, and if possible, biological good, of the family, but certainly not for romantic love. Since many young men, as a disease of youth, harbor romantic notions, and since, even if they are free from romance, they cannot for economic reasons marry very young, it is right and proper for them to take mistresses.

Children of such mistresses—if she is awkward enough to have them—are simply part of the great social process, like the poor or the mad, and though we may be sorry for them, we cannot permit them to break up the family. There has to be a certain supply of immoral women to take up the slack of young men waiting for marriage, but most women are to be held to a rigid sexual morality. The mother must be virtuous, or we cannot even be sure that the family deserves the sacred name of the father. In short, the family is in a microcosmic way a state of its own, guided partly by *raison d'état*, perpetuating itself if necessary by the ruthless brushing aside of recalcitrant elements, and drawing upon the full human attributes of its members, not merely upon their intelligence.

Now these sentiments are many of them selfish, cruel, "illogical" (that is, if one compares them with what one thinks a sentiment ought to be), at shocking variance with what some of the noblest human beings have defined as most genuinely human. They represent, and notably in precisely this problem of the treatment of illegitimate children, some strengthening of the harsher and less humane sentiments, as compared with the last years of the old régime in France. This increasing severity, which is reflected in article 340 of the Code, may cautiously be described as in part the substitution of bourgeois sentiments of the integrity of the family for aristocratic sentiments of the integrity of the family.[9] The social gap between the aristocrat and the rest of the world was so great that he could afford to recog-

[9] Cautiously, because the simpler Marxians think of bourgeois not as a way of life, but as an economic abstraction.

nize his bastards. The spendthrift tradition of aristocracy was a partial guarantee that the bastard would not be denied some largess. Honor, which is a sentiment as well as a word, was perhaps of greater force among the old aristocracy, than among the bourgeoisie, and the practical puritanism that would bid a small town banker or a grocer conceal any sexual irregularities certainly had not such force among the old aristocracy. The fact that the so-called "double-standard" in sex relations had in eighteenth century France quite given way to the "single-standard" among the upper classes is a finally convincing proof that these sentiments of the integrity of the family were not as strong in aristocratic France of 1789 as in bourgeois France of 1804.[10]

The increasing intensity of humanitarian attacks on this bourgeois view of the family—and the subject of illegitimacy gave them an excellent opportunity—is in itself no doubt partly a tribute to the success which the bourgeois family was having in nineteenth century France. Nothing in eighteenth century literature on the subject has quite the same bitterness as *La Dame aux Camélias* and *Les Idées de Madame Aubray*. "Toute fille vient au monde vierge. Pour faire cesser cet état de virginité, il faut l'intervention de l'homme. Une fois cette virginité détruite autrement que par le mariage, le déshonneur commence pour elle, et la prostitution se

[10] Literature is, taken by itself, perhaps no sounder indication of the actual practices of a society than law; but look at almost anything Crébillon fils ever wrote, or at Diderot, Voltaire, Montesquieu in their lighter moments. That the true bourgeois sentiment was all against the "single-standard" comes out in the work of Restif de la Bretonne, a very erotically inclined person, but thoroughly moral in his views for others, and for the family. Restif came from prosperous peasant stock already even before the Revolution assimilating itself to the *bourgeoisie*.

présente. Protégez la femme contre l'homme, et protégez-les ensuite l'un contre l'autre. *Mettez la recherche de la paternité dans l'amour*, et le divorce dans le mariage." And again, "le fait d'avoir mis *volontairement* au monde un de ses semblables, sans aucune garantie de morale, d'éducation, ou de ressources materielles, étant envers la société un délit plus grave que celui d'avoir volé nuitamment et avec effraction, égal à celui d'avoir tué, donner la vie dans de certaines conditions est meme plus barbare que de donner la mort."[11]

Now the sentiments of family integrity which are reflected in article 340 of the Code, in the whole status of illegitimate children in post-revolutionary France, may well be, judged from most ethical and aesthetic standards, as contemptible as Dumas fils or anyone else ever thought them. But it is impossible to deny that these sentiments won out in 1789-1804 because they were stronger among people who had social, political, economic power, than were humanitarian sentiments. Further than that it is perhaps risky to go. But it may also be hazarded that these sentiments were of a kind to counteract in individuals who held them the extremes of individualism, experimentation, and other forms of social mobility characteristic of the Western World in the nineteenth century; that they survived so well, not merely because they were very old and very unreasonable sentiments, but because at that particular moment they afforded a kind of discipline—again not a very "noble" or "idealistic" discipline, but a discipline very useful in an age of scramble.

[11] Alexandre Dumas fils, *Théâtre complet* (Paris, 1893) I, 48-50. (Preface to *La Dame aux Camélias*). Dumas fils himself was an illegitimate child. The italics are mine.

V. The essential facts of our record are very simple. The law distinguishes in 1789 between legitimate and illegitimate children. A very fashionable theory current in 1789 asserts that legitimate and illegitimate children are identical in the eyes of Nature and should be identical in the eyes of the law. A revolution occurs, in which indeed the whole matter of illegitimacy does not bulk very large, and as a result the law is altered to conform to the theory. Within a year or so the law is wholesalely violated, or at least administered in a spirit quite contrary to the letter, and when the new revolutionary law code is finally promulgated, the law of illegitimacy is more harsh, more remote from the briefly triumphant theory than had been the law in 1789. We have attempted to explain why the new law was even harsher than the old, why the theory had so little success in permanently transforming French law and French sentiments to accord with what Nature, or even Liberty, Equality, Fraternity, demanded. A somewhat subtler problem is offered by the fact that Nature, Liberty, Equality, Fraternity, Virtue, Reason and their cohorts did after all triumph for a time, however brief. Had the victory been won by a small band of men willing to risk ultimate death for a brief tenure of power, the problem would be simpler. But the truth of the French Revolution is not quite so happily melodramatic. Robespierre may indeed be the religious fanatic (he is, as a matter of fact, somewhat more complicated than that), St. Just the boy hero, Marat, Le Bon, Carrier and others victims of various neuroses common to violent radicals—there is clearly a nucleus of men who are, in some measure, *abnormal,* abnormal above

all in the absence of the sentiments, predispositions to laziness, cowardice, and commonsense which prevent men from trying to put their ethical ideals into practice. But the great bulk of the men who made the Revolution—and the Terror—the men who enthusiastically voted the abolition of bastardy, were essentially ordinary, prosperous middle class Frenchmen.[12]

Now Cambacérès, Oudot, Berlier and their fellows were undoubtedly carried somewhat beyond themselves by the sheer religious intoxication of 1793. Much of what they wrote into legislation is simply so much sermonizing, so much rhetoric. Confronted with the challenge as to whether they intended to carry out this legislation they would, at least in 1793-1794, undoubtedly have answered yes. But, to confine ourselves to the subject of this study, when they came to consider the application of a law making the child of an irregular union the equal of the child of marriage, they had almost immediate recourse to the prohibition of *la recherche de la paternité*. Along one pleasant track their minds passed easily to the full rehabilitation of these children of nature, once called bastards; on an equally pleasant track their minds arrived at a France filled with virtuous, happy married couples. Now bastardy and marriage in this world are quite complementary—

[12] See my *Jacobins* (New York, 1930). Both in that book and in my *Decade of Revolution* (New York, 1934) I have called attention to this gap between the social position of the men who made the Terror and their acts as Terrorists, and have insisted that here moderate men act immoderately. This monograph on revolutionary legislation on illegitimacy seems to me to confirm my former diagnosis and to suggest an additional explanation—that these immoderate moderates, these respectable revolutionaries, never *intended* (and by intention I mean the will as guided by sentiment) to apply their laws immoderately (or, in this instance, literally).

you cannot have one without the other. In another world, you may indeed separate the two institutions and eliminate one of them, either by having marriage so perfect—in various senses—that no one will ever commit fornication or adultery, or by having fornication so perfect that no one will ever commit marriage. But these are definitely other worlds. If the two tracks in our legislators' minds ever met at all, it was in another world, and presumably in the first of our alternatives—the world of perfect marriage. Had they met in this world, the result would have been a collision and the re-establishment of some kind of adjustment between them. Actually the legislators, at least in this matter, really seem to have anticipated the collision, to have made an adjustment—by forbidding *la recherche de la paternité*—before the full emergency arose. *These revolutionists never got so far, even under the religious excitement of the Terror, as to try to live up to their theories.* The result is a gap of more than usual proportions between their words and their deeds, a gap which they probably never saw, and into which faithful republican historians like Aulard and Sagnac have poured a great many more words—without filling it. The revolutionists had always the bravest intentions. They really had meant to eliminate bastardy—and bastards. They *had* eliminated them. Were not the poor little creatures now known officially as orphans, unofficially as illegitimate children, natural children, love children, children born out of wedlock—by a lot of rather nice names, in short?

This discrepancy between what men do and what they say, between their intentions and their theories is

not new with the French Revolution. What was rather new (though it had occurred before in individuals, and in groups at similar crises) was the apparent attempt made by certain Frenchmen in 1793-1794 to make their intentions conform to their theories, to bring their lives up to the level (and a very high level it was) of their abstract ethical ideals. To judge from the history of their legislation on illegitimacy, this attempt was not quite so valiant, not even quite so successful for the moment, as would appear from the more ritualistic and dramatic aspects of the attempt which have chiefly held the attention of the historians. As regards bastardy, the revolutionists maintained quite as big a gap between profession and practice as do the canniest of conformists. Their sentiments failed even momentarily to catch up with their theories. They were not revolutionists at all. They were humbugs, and very decent people, *pères de famille,* in fact.

APPENDICES

APPENDIX A

THE main sources of this study for the period of the National Assembly and the Convention are the printed *cahiers*, the *Moniteur*, and the *Archives parlementaires;* for that of the Consulate, the well-known collection of Fenet on the redaction of the Napoleonic code. All of these sources are familiar to students of the period, and are available in large libraries. The publication of the *Archives parlementaires* has most unfortunately not been resumed since the war, so that this source is not available for the period of the Directory. Nor are the newspapers of much use here, for their summaries of debates are colorless and brief. Fortunately, many of the reports and speeches of the two councils were printed separately. There is a series of these speeches dealing with illegitimacy available in the Boulay de la Meurthe collection in the Harvard Library. A list of these pamphlets—they are not catalogued in detail—follows. I note briefly whether or not a speaker is *for* or *against* equal, or more nearly equal, treatment of illegitimate children in relation to legitimate ones.

1. *Rapport fait par Siméon au nom d'une commission spéciale, composée de Cambacérès, Bézard, Oudot, Favart, et Siméon, sur la successibilité des enfans naturels.* Conseil des Cinq-cents. 18 messidor, an V. 50 pp. Against

2. *Motion d'ordre faite par Pollart (de la Seine) sur les enfans nés hors mariage.* Conseil des Cinq-cents. 26 vendémiaire, an VI. 16 pp. Against

3. *Opinion de Bergier sur la successibilité des enfans naturels.* Conseil des Cinq-cents. 8 frimaire, an VI. 6 pp. Against

4. *Opinion de F. Lamarque sur les droits de successibilité des*

enfans naturels. Conseil des Cinq-cents. 8 frimaire, an VI. 7 pp. Against

5. *Rapport fait par Favard, au nom d'une Commission spéciale, sur un message du Directoire exécutif, relatif à la reconnaissance des enfans naturels.* Conseil des Cinq-cents. 13 pluviôse, an VI. 16 pp. Against

6. *Rapport fait par Regnier, sur la résolution du 8 frimaire, relative à la successibilité des enfans naturels.* Conseil des Anciens. 21 pluviôse, an VI. 16 pp. Against

7. *Opinion de Bergier sur la question de savoir si les enfans naturels, dont les pères sont décedés depuis la loi du 12 brumaire, an 2, sans les avoir reconnus, leur ont succédé.* Conseil des Cinq-cents. 28 pluviôse, an VI. 10. pp. Against

8. *Opinion de Beyts sur le project Favard relatif à la successibilité des enfans nés hors de mariage.* Conseil des Cinq-cents. 28 pluviôse an 9 [misprint for 6]. 22 pp. For, with qualifications

9. *Opinion de Riou sur le vrai sens de la loi du 12 brumaire.* Conseil des Cinq-cents. 28 pluviôse, an VI. 8 pp. For

10. *Rapport fait par Lenoir-Laroche sur une résolution du 16 floréal dernier, relative aux preuves de possession d'état que doivent rapporter les enfans nés hors du mariage depuis la loi du 12 brumaire.* Conseil des Anciens. 21 messidor, an VI. 23 pp. For

11. *Opinion de Girod (de l'Ain) sur la résolution du 16 floréal.* Conseil des Anciens. 8 thermidor, an VI. 20 pp. Against

12. *Opinion de J. G. Lacuée, sur la résolution du 16 floréal.* Conseil des Anciens. 11 thermidor, an VI. 14 pp. Against

13. *Opinion de Lefebvre-Cayet sur la résolution du 16 floréal.* Conseil des Anciens. 11 thermidor, an VI. 26 pp. For

14. *Opinion de Rallier sur la résolution du 16 floréal.* Conseil des Anciens. 11 thermidor, an VI. 10 pp. Against

15. *Opinion de Pérès (de la Haute Garonne) sur la résolution du 16 floréal.* Conseil des Anciens. 12 thermidor, an VI. 14 pp. Against

16. *Opinion de Delécloi sur la résolution relative aux enfans*

nés hors mariage. Conseil des Anciens. 13 thermidor, an VI. 6 pp. For

17. (*Seconde*) *Opinion de Lefebvre-Cayet sur la résolution du 16 floréal.* Conseil des Anciens. 13 thermidor, an VI. 6 pp. Against (change of vote)

18. *Opinion de J. Maleville sur la deuxième résolution du 16 floréal.* Conseil des Anciens. 13 thermidor, an VI. 6 pp. Against

19. *Opinion de F. T. Huguet sur les résolutions du 16 floréal.* Conseil des Anciens. 14 thermidor an VI. 14 pp. Against

20. *Motion d'order faite par D'Outrepont* (*de la Dyle*) *sur le droit de successibilité accordé . . . . . aux enfans nés hors du marriage.* Conseil des Cinq-cents. 1 fructidor, an VI. 14 pp. Against

APPENDIX B

THE following project for a law on the status and inheritance rights of children born out of wedlock is printed in pamphlet number 1 of the collection listed above in Appendix A. It gives in *Titre premier* an excellent summary of the confused legislation of the Convention. The rest of the project may be compared with any edition of the Civil Code up to 1896, and even 1912, or with the brief account of its provisions on illegitimacy given on pp. —— above. It will be seen that the main outlines of these provisions of the Civil Code are drawn in the following project *almost ten years* before the Code was finally promulgated. Consult also Cambacérès's first project for a code made as early as 1793, in *Archives parlementaires*, LXX, 551-583 or in the first volume of P. A. Fenet, *Recueil complet des travaux préparatoires du Code civil* (Paris, 1827).

CONSEIL DES CINQ-CENTS

18 MESSIDOR, AN V

Projet de résolution générale sur la successibilité et les droits des enfans nés hors du mariage.

TITRE PREMIER

De la successibilité des enfans nés hors du mariage, telle qu'elle a dû avoir lieu par la nouvelle législation, jusqu'à ce jour.

Article Premier

Les enfans nés hors du mariage ont recueilli à l'égal des enfans nés dans le mariage, et en concurrence avec eux, les successions de leurs pères et mères ouvertes depuis la publication de la loi du 4 juin 1793.

II.

Ils ont été déchus de l'effet rétroactif de la loi du 12 brumaire an 2, par celle du 15 thermidor an 4, dont les articles I, II et III seront exécutés selon leur forme et teneur.

III.

Les enfans nés hors du mariage, à leur défaut leurs enfans et descendans, ont recueilli, soit immédiatement de leur chef, soit médiatement par représentation de leurs pères et mères, les droits que leur donnérent les articles IX et XVI de la loi du 12 brumaire an 2 sur les successions directes et collatérales, ouvertes depuis sa publication jusqu'à celle de la loi du thermidor an 4, quoique leurs pères et mères fussent morts avant le 4 juin 1793.

IV.

A compter de la publication de la loi du 15 thermidor an 4, les enfans nés hors du mariage, dont les pères et mères étoient morts avant le 4 juin 1793, n'ont pu ni les représenter, ni succéder eux-mêmes de leur propre chef dans les successions, soit directes, soit collatérales.

Néanmoins il leur sera accordé sur les successions directes seulement dont ils auront été privés, une pension égale au revenu du tiers de la portion qu'ils y auroient prise s'ils étoient nés dans le mariage.

V.

Les enfans nés hors du mariage qui, lors de la publication de la loi du 12 brumaire an 2, étoient en instance avec des héritiers direct ou collatéraux, pour la succession de leurs pères ou de leurs mères, et dont les réclamations n'auroient pas été terminées par jugement en dernier ressort, ont recueilli le tiers de la portion qu'ils auroient eue s'ils étoient nés dans le mariage.

VI.

Les enfans nés hors du mariage dont les pères ou mères

étoient, lors de leur naissance, engagés dans les liens du mariage, ont recueilli à titre d'alimens sur les successions de leurs pères et mères ouvertes depuis le 4 juin 1793, le tiers en propriété de la portion à laquelle ils auroient droit s'ils étoient nés dans le mariage.

VII.

Pour être admis aux droits ci-dessus, les enfans nés hors du mariage dont les pères ou mères étoient morts avant la publication de la loi du 12 brumaire, ont dû prouver leur possession d'état, conformément à l'article VIII de ladite loi.

VIII.

Ceux dont les pères étoient encore vivans lors de la publication de la loi du 12 brumaire, n'ont pas acquis le droit de leur succéder, s'ils n'ont été par eux reconnus dans un acte public.

IX.

Ils ont succédé à leurs mères, indépendemment de toute reconnoissance de leurs pères, en prouvant contre leurs mères ou leurs héritiers, qu'ils en étoient nés.

X.

La signature à titre de père à l'acte de naissance de l'enfant, dans les registres de l'état civil, équivaut à une reconnoissance, si le père est décédé, et si l'acte est postérieur à la publication de la loi du 4 juin 1793.

XI.

Les dispositions testamentaires que les pères décédés après la publication de la loi du 12 brumaire an 2, ont faites en faveur de leurs enfans nés hors du mariage, n'équivalent pas à reconnoissance; mais elles ont acquis aux enfans ce qu'elles leur donnoient.

XII.

Les jugemens qui ont déclaré la filiation, contre des pères encore vivans, ou qui ont été rendus contre leurs héritiers après leur décès, et la publication de la loi du 12 brumaire an 2, ne suppléent point à la reconnoissance volontiare, nécessaire pour la successibilité, à moins qu'ils ne concourent avec un acte public de reconnoissance.

Les droits accordeés par ces jugemens seront maintenus, s'ils n'excèdent pas le tiers de la portion que l'enfant auroit recueillie s'il eût été volontairement reconnu et successible; dans le cas contraire, ces droits seront réduits au tiers sans aucune restitution des fruits de l'excédent.

XIII.

Tous jugemens contraires aux dispositions interprétatives et déclaratives ci-dessus pourront être attaqués par voie de cassation pendant trois mois, à compter de la publication de la présente, non-obstant tout laps de temps.

TITRE SECOND.

Des droits des enfans nés hors du mariage sur les successions à venir.

Article Premier.

Les enfans nés hors du mariage succéderont en totalité à leurs mères et à leurs descendans maternels, comme s'ils étoient nés dans le mariage, dans le cas où ils ne seront point en concours avec des enfans ou descendans légitimes.

II.

Dans le cas de ce concours, ils ne prendront chacun dans les successions directs maternelles que la moitié de ce qu'ils y auroient pris, s'ils étoient nés du mariage.

III.

S'ils sont nés d'une femme mariée, et pendant son mariage,

ils ne succéderont chacun à cette femme et à ses descendans que pour le quart de ce qu'ils auroient eu s'ils avoient été légitimes.

IV.

Les enfans naturels nés hors du mariage, et reconnus par un acte public dans la forme ci-après prescrite, succéderont à leurs pères, conformément aux règles suivantes.

V.

Ils recueilleront la moitié de la succession de leurs pères, si ceux-ci n'étoient pas engagés dans des mariages lors de leur conception, et s'ils sont décédés sans enfans légitimes. L'autre moitié appartiendra à ceux qui, à leur défaut, auroient succédé en totalité.

VI.

En cas de concours avec des enfans légitimes, chaque enfant naturel aura le tiers de ce qu'il auroit recueilli, s'il eût été légitime; et le quart seulement, s'il n'a été reconnu qu'après que ses père et mère s'étoient engagés dans des mariages desquels il existe des enfans.

VII.

Les enfans naturels nés de pères et mères engagés tous les deux, ou l'un d'eux dans des mariages, ne recueilleront dans la succession de leurs pères que le tiers de ce qu'ils y auroient pris, s'ils étoient nés dans le mariage, s'ils concourent avec des collatéraux; et le quart seulement, s'ils concourent avec des enfans légitimes.

VIII.

En cas de prédécès de leurs pères, les enfans naturels reconnus succéderont à leurs aïeul, aïeule et autres ascendans paternels décédés sans descendans légitimes, chacun pour la moitié de ce qu'ils en auroient recueilli s'ils étoient nés dans le mariage;

Pour un quart seulement, s'il y a des descendans légitimes;

Et pour un cinquième, s'ils ne sont nés ou n'ont été reconnus qu'après le mariage de leurs pères.

IX.

Les enfans nés hors du mariage ne succéderont en collatérale qu'à leurs frères ou soeurs naturels, et à ceux des parens collatéraux de leurs pères, qui les auront reconnus et déclareés leurs successibles par acte public entre-vifs ou de dernière volonté.

Ils succéderont aux collatéraux de leurs mères, si leur filiation maternelle est prouvée.

X.

S'ils décèdent sans enfans et sans frères ou soeurs naturels ou sans neveux et descendans de ceux-ci, ils auront pour successeurs leurs pères et mères.

XI.

Ils auront pour successeurs en collatérale, à l'exclusion de tous autres, leurs frères et soeurs naturels, s'ils en ont, ou leurs représentans; et enfin, à défaut, les parens collatéraux de leurs pères et mères.

XII.

Il n'est nullement dérogé par la présente résolution aux droits résultans du mariage subséquent.

XIII.

Les enfans nés hors du mariage, non reconnus par leurs pères, n'ont aucun droit ni de successibilité ni d'alimens sur leur succession.

XIV.

La loi du 13 brumaire an 2, ainsi que toutes les dispositions des autres lois, en ce qu'elles ont de contraire à la presente, sont abrogées.

TITRE III.

Des conditions nécessaires pour la successibilité des enfans nés hors du mariage sur les successions qui s'ouvriront à l'avenir.

Article Premier

Ne seront point successibles à leurs pères et assendans paternels les enfans nés hors du mariage, dont les pères étoient vivans lors de la publication de la loi du 12 brumaire, s'ils n'ont été ou s'ils ne sont reconnus par eux dans un acte public.

II.

Pour avoir son effet, la reconnoissance ne pourra être faite désormais que devant l'officier public chargé de la tenue des registres de l'état civil; elle sera faite par un acte séparé de celui de naissance, et elle sera mentionnée à la marge dudit acte.

III.

Il sera déclaré dans la reconnoissance si le père ou la mère étoient mariés, ou l'un d'eux, neuf mois avant la naissance de l'enfant reconnu.

IV.

Si la mère est nommée dans la reconnoissance, et qu'elle la désavoue, la reconnoissance sera de nul effet; mais le désaveu ne peut plus être donné, si la mère a déja reconnu de son chef ou conjointement avec le père.

V.

La reconnoissance d'un enfant né hors du mariage ne donne point droit à la révocation des donations par survenance d'enfans.

VI.

Aucun enfant né hors du mariage n'a action contre son père ou ses héritiers pour s'en faire reconnoître.

En conséquence, nulle preuve de paternité hors du mariage ne sera admise à l'avenir, si ce n'est en cas de pertes des registres où la reconnoissance auroit été faite: au quel cas on se conformera à la loi du 2 floréal an 3.

VII.

L'enfant méconnu par sa mère a la faculté de prouver contre elle sa filiation.

VIII.

La maternité se prouve par les actes de possession, par témoins, et encore par la grossesse et l'accouchement.

IX.

Si la mère d'un enfant né hors du mariage s'est mariée, ou si elle est veuve avec enfans, toute recherche de maternité est interdite contre elle, et, après sa mort, contre ses enfans légitimes.

X.

Toute action pour grossesse ou prétendue séduction est ôtée aux filles et femmes; elles ne pourront prétendre, selon les circonstances, que des frais de couche et les mois de nourrice de l'enfant, tels qu'ils seront reglés par les tribunaux, et sans que, de la condamnation, on puisse induire ni aucun autre droit pour l'enfant, ni la paternité.

TITRE IV.

Des droits des enfans nés hors du mariage pendant la vie de leurs pères et mères.

Article Premier

Les enfans nés hors du mariage qui auront été reconnus par leur pères, ou ceux qui seront avoués par leurs mères, ou qui auront fait preuve contre elle de leur filiation, auront droit à des alimens.

II.

Les alimens comprennent tout ce qui est nécessaire pour faire vivre l'enfant, l'élever et l'établir; ils seront adjugés par les tribunaux, en proportion des facultés des parens et de l'état de leur famille s'ils sont mariés et ont des enfans légitimes.

III.

L'enfant ne pourra rien exiger à titre d'alimens, lorsqu'il sera reçu, nourri et élevé dans la maison de son père ou de sa mère.

IV.

La présente résolution sera imprimée, et portée au Conseil des Anciens par un messager d'état.

INDEX

INDEX